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NO. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MINAS H. PAPAS, et al.,

Petitioners,

vs.

THE UPJOHN COMPANY, and ZOECON CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED[1]

1. Did the court of appeals err in ruling that Congress intended the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et. seq.* ('FIFRA'), to impliedly preempt state common law damage claims for failure to warn and inadequate labeling?

2. Did the court of appeals err in ruling that Congress intended FIFRA to impliedly preempt such claims, even when the Environmental Protection Agency ('EPA') registered a product and approved its label on the basis of inaccurate information submitted by the manufacturer?

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[1] Petitioners, Minas H. Papas and Ollie M. Papas, his wife, appeared as Plaintiffs/Appellants below. Respondents The UpJohn Company and Zoecon Corporation appeared as Defendants/Appellees below. In addition, the following parties appeared as *amicus curiae* in the Court of Appeals: The State of Florida, Attorney General Robert A. Butterworth; Consumers Union of the United States, Inc.; National Coalition Against the Misuse of Pesticides; United Farm Workers of America; Farm Workers Justice Fund, Inc.; Comite DeApoyo A Los Trabajadores Agricolas; and Trial Lawyers for Public Justice, PC (all in support of Petitioners) and National Agricultural Chemicals Association; Chemical Manufacturers Association; Chemical Specialties Manufacturers Association; American Wood Preservers Institute; National Pest Control Association; Product Liability Advisory Counsel; Reichhold Chemicals, Inc; and The Dow Chemical Company (all in support of Respondent Zoecon).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the district court is unreported and appears in the appendix to this petition at Pet. App. 13-26. The opinion of the court of appeals is reported at 926 F.2d 1019 (11th Cir. 1991), and appears at Pet. App. 1-12.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTES AND REGULATIONS

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 et. seq. ('FIFRA'), provides in pertinent part as follows:

§ 136v. (1988) Authority of States

(a) In general

A State may regulate the sale or use of any federal registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continuein effect any requirements for labeling orpackaging in addition to or different from those required under this subchapter.[2]

* * * * *

§ 136(p) Label and labeling -

(1) Label. - The term "Label" means thewritten, printed, or graphic matter on, orattached to, the pesticide or device, or anyof its containers or wrappers.

(2) Labeling. - The term "Labeling" means all labels and other written, printed orgraphic matter -

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[2] § 136v(b) of FIFRA was amended, effective October 25, 1988. The only change to the language of this portion of the statute was to add the heading to § 136v(b) "Uniformity". The events that formed the factual basis for the Petitioners' claims in the underlying lawsuit all occurred prior to 1988.

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, States experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT

This is a diversity action, filed pursuant to 28 U.S.C. §1332, seeking damages under Florida common law for severe personal injuries suffered by petitioner Minas H. Papas and derivative injuries suffered by his wife, Ollie M. Papas. From 1982 through 1986, Mr. Papas was employed by the Clay County Humane Society in Clay County, Florida. One of his duties was the administration of treatments for dermatological disorders found in dogs housed in the Humane Society's animal shelter. This required physically dipping the dogs in a bath containing one of two products - -Paramite, a product manufactured by respondent Zoecon, or Mitaban, an extremely similar product manufactured by Upjohn. Throughout the course of his employment, Mr. Papas was repeatedly and continuously drenched by these products, and inhaled their fumes.

In July of 1986, Mr. Papas began displaying symptoms of serious health disorders. He was ultimately hospitalized in late 1986, diagnosed as having aplastic-anemia/pancytopenia, a debilitating hematological disorder, and declared totally disabled. His condition and symptoms were consistent with a classic case of benzene poisoning. Once Mr. Papas was completely removed from his work environment and no longer administered the products, his condition improved to a limited degree (indicative of the causal relationship between exposure to the product and the disease), but he still suffers from irreparable damage to his hematological system and remains disabled.

Both Zoecon's and Upjohn's products contained, as approximately 70% of their makeup, an aromatic petroleum based hydrocarbon solvent as an inert ingredient. The solvent utilized in Zoecon's product (known as "Sure-Sol 190") typically consisted of 1/10 of 1% (0.10%) of benzene by weight. The solvent utilized in Upjohn's Mitaban product also contained benzene, in a somewhat smaller, but nevertheless measurable, amount. Benzene is a highly toxic substance which has been placed on the EPA's "list of inerts of toxicological concern."

While both Paramite and Mitaban were registered with the EPA and the Food and Drug Administration ('FDA'), and each bore a label approved by one of those agencies, neither product's label informed end users, such as Mr. Papas, that the product contained any benzene. Similarly, neither label included any

warning whatsoever of the potential for the development of diseases, such as aplastic anemia/pancytopenia, which could result from long term exposure.

Under EPA regulations promulgated pursuant to FIFRA, manufacturers seeking to register pesticides submit self-prepared test data to the EPA, which EPA then reviews, but does not actually test itself. *See*, 40 C.F.R. Part 158 (1988). Manufacturers also submit proposed labels for pesticides to the EPA, which can approve, disapprove, or suggest modifications to them, and manufacturers may apply to have the EPA approve changes in previously approved labels. *See*, 40 C.F.R. Part 156 (1988).

In this case, however, none of those regulatory procedures provided any protection to Mr. Papas and his wife. Amazingly, plaintiffs learned during discovery that neither Zoecon nor Upjohn informed either the EPA or the FDA of the presence or quantities of benzene contained in their products.[3]

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[3] Both Upjohn's and Zoecon's products have been registered with both the FDA, pursuant to the Federal, Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et. seq.* (the "FDCA"), and the EPA, under FIFRA. The base formulation of Zoecon's Paramite product had previously been registered as a pesticide under FIFRA prior to the amendment of the statute and creation of the EPA in 1972. When FIFRA was amended in 1972 it allowed for products previously registered, such as the base formulation of Paramite, to be re-registered by EPA with relatively little regulatory review of the product and its labels. That is what happened with Paramite. The Paramite product was later also deemed to be a new animal drug, but, since its base formulation was already registered with the EPA, that agency, rather than the FDA, reviewed and approved the Paramite label. Upjohn's Mitaban product was initially proposed for approval in the late 1970's and was deemed at that time to be a new animal drug. Accordingly, the FDA approved the labels borne by that product. *See*, 7 U.S.C. § 136(u).

In February 1988, Mr. Papas and his wife commenced this action against Upjohn and Zoecon in the United States District Court for the Middle District of Florida, seeking damages from both companies in separate counts for negligence, strict liability, and breach of implied warranty of merchantability. Common to each count, in addition to other asserted bases for relief, was the charge that the labels failed to adequately warn of the products' dangers and of steps that should be taken to avoid them. The answers filed by both Zoecon and Upjohn raised as a defense that they had fully complied with all federal labeling requirements under FIFRA, thereby satisfying any duty to warn.

On April 10, 1989, Zoecon moved for partial summary judgment on the basis that section 136v(b) of FIFRA expressly preempts all of plaintiffs' claims to the extent that they allege inadequate warning or labeling.[4] In response, the Papases asserted that FIFRA neither expressly nor impliedly preempts state common law failure to warn claims, relying upon the holding in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C.

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[4] Upjohn did not join in Zoecon's motion for partial summary judgment, in part because its product's label was approved by the FDA, rather than the EPA, since its product was deemed by the agencies to be a new animal drug and not a pesticide. In light of case law which overwhelmingly holds there is no preemption of such claims by the FDCA, which contains a provision comparable to 7 U.S.C. § 136v(b), Upjohn recognized that to join in the motion would have been futile. *See, e.g. Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 n.1, 1113-14 (4th Cir. 1988).

Cir. 1884), *cert. denied,* 469 U.S. 1062 (1984). The *Ferebee* case was the only federal appellate decision in the country addressing the issue of FIFRA's preemptive effect on common law damage claims. It held that there was no preemption whatsoever.

The Papases also contended, relying on *Hurley v. Lederle Lab. Div. of American Cyanamid,* 863 F.2d 1173 (5th Cir. 1988) (which held that FDA approval of a proposed label has no preemptive effect if based on incomplete or inaccurate information), that the EPA's registration of Paramite and approval of its label could not preempt plaintiffs' claims because EPA's actions were based on incomplete and inaccurate information. Simply put, Congress could not have intended that EPA's approval of Paramite's label would immunize Zoecon from liability for failure to warn of benzene, when Zoecon had not even told the EPA that Paramite contained that highly dangerous chemical.

On August 2, 1989, the district court granted Zoecon's motion and entered judgment for Zoecon and against the Papases to the extent that the Papases' claims were based on failure to warn, finding that FIFRA expressly preempted such claims. The district court recognized the controlling nature of this preemption ruling and certified its order for interlocutory appeal under 28 U.S.C. § 1292 (b).[5] Zoecon agreed with the Papases' applica-

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[5] The district court stayed the proceedings pending the disposition of an interlocutory appeal.

tion and in fact asked the Eleventh Circuit to hear the interlocutory appeal, which it did. *See, Papas v. Upjohn Co.*, Pet. App. 2.

On February 28, 1991, the court of appeals issued its decision, *per curiam*, holding that FIFRA impliedly preempts the Papases' claims to the extent they are based upon inadequate warning and labeling. The decision did not explicitly mention basic legal principles of the presumption against preemption or basic legal principles of preemption analysis (particularly implied preemption analysis), but the court's ruling turned on the presumption's presence and (in the court's view) its absence.

The court first reviewed FIFRA's statutory language and regulations promulgated by EPA under FIFRA, and, undoubtedly, due in part to the presumption against preemption, declined to find that plaintiffs' common law claims were expressly preempted. "[M]indful that 'Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires'," the court said, quoting its earlier decision in *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3628, 110 S.Ct. 1781 (1990), "we admit to a little uncertainty and pass over the question of express preemption.' *Papas*, Pet. App. 7.

The court's implied preemption analysis, however, was not affected by the presumption against preemption, however, because, in the Eleventh Circuit's view, the presumption

simply does not apply to an implied preemption analysis. It recently stated:

> [I]n contrast to the strong presumption against preemption that we apply in determining whether the language of a federal statute or regulation expressly preempts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights.

Taylor, supra.

In the case at bar, the Eleventh Circuit was guided by and ratified this view, noting:

> [I]n implied preemption analysis it is possible to infer preemptive intent solely from effects: even if statutory language or legislative history is unclear....

Papas, Pet. App. 4, *quoting Taylor, supra.*

With this starting point, the Eleventh Circuit concluded that FIFRA impliedly preempted state common law damage inadequate warning claims for essentially two reasons. First, in an unprecedented finding, it held that Congress had completely occupied the field of pesticide labels and warnings. Second, it found a conflict between state law damage actions and compliance with FIFRA because the court believed that permitting state damage actions to proceed would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." Pet. App. 9. Although the court acknowledged that its holding directly conflicted with *Ferebee*, it neither

distinguished *Ferebee* nor gave any meaningful explanation as to why it disagreed with the *Ferebee* court's analysis and conclusions. Pet. App. 1, 10.

The court also rejected the Papases' contention that there could be no preemption where, as here, the EPA had approved the proposed labels and warnings based upon inaccurate and incomplete information provided by the manufacturer. Under FIFRA, the court said, it was up to the EPA to decide whether the label was inadequate or based on inaccurate information and, if so, whether the label should be changed. It did not explain why Congress would have wanted to give preemptive effect to labels approved on the basis of inaccurate information.

REASONS FOR GRANTING THE WRIT

The federal government has been regulating pesticide labeling for over forty years. In 1947, Congress enacted FIFRA as "primarily a licensing and labeling statute"; the legislation "contained general standards setting forth the types of information necessary for proper labeling of a registered pesticide, including instruction for use; warnings to prevent harm to people, animals, and plants; and claims made about the efficacy of the product." *Ruckelshaus v. Monstanto Co.*, 467 U.S. 986, 991 (1983). Twenty-five years later, in 1972, "[b]ecause of mounting public concerns about the safety of pesticides and their effect on the environ-

ment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest," Congress expanded FIFRA's scope, transforming it "from a labeling law into a comprehensive regulatory statute." *Id.* Neither version of FIFRA, however, said anything about compensating pesticide poisoning victims or displacing the traditional role of the states in providing for such compensation.

Throughout this time period, consumers injured by inadequately labeled pesticides sought and obtained compensation through state common law tort actions. As in other product liability cases, manufacturers routinely argued that compliance with federal standards precluded a finding of liability and, again as in other such cases, the states routinely rejected that argument - - holding that compliance constituted strong, but not conclusive, evidence that the manufacturers gave an adequate warning for purposes of state common law.

In the early 1980's, the manufacturers, taking another tack, even argued that EPA approval of pesticide labels under FIFRA preempted state common law based warning claims. This argument, however, was seemingly put to rest by the unanimous decision of The United States Court of Appeals for the District of Columbia Circuit in *Ferebee, supra*. The *Ferebee* court rejected the preemption argument in its entirety, holding that Congress

had no intent whatsoever to preempt state common law based warning claims relating to pesticides.

Thus, for virtually the entire past forty years, a judicial state of affairs has existed whereby compliance with FIFRA, like compliance with other federal consumer protection statutes, did not wholly immunize manufacturers from liability under state common law. *See, e.g., Wells v. Ortho-Pharmaceutical Corp.*, 788 F.2d 741 (11th Cir. 1986), *cert. denied* 479 U.S. 950 (1986) (in which the Eleventh Circuit quoted extensively from *Ferebee; United States v. Bass*, 404 U.S. 336 (1971).

A few years after *Ferebee*, manufacturers defending against inadequate warning claims in cases involving cigarettes began to successfully assert the defense that such claims were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et. seq.* (the 'Cigarette Act'). *See, Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 59 U.S.L.W. 3652, 111 S.Ct. 386 (1991). Consequently, pesticide manufacturers again began to claim that FIFRA's labeling provisions preempted state common law warning claims relative to pesticides, arguing that FIFRA was analogous to the Cigarette Act, and seeking to overturn the *Ferebee* decision. The first reported case where such an argument was given any judicial support was in *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

There are, it should be noted, significant differences between the Cigarette Act and FIFRA, which make the argument for FIFRA preemption of pesticide warning claims far less compelling than the argument for preemption asserted in the cigarette cases. As the First Circuit said in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 n. 13. (1st Cir. 1987):

> Under FIFRA, each manufacturer drafts a warning label for each product for EPA approval. Thus, two manufacturers of the same regulated product may use different labels of their own choosing, provided only that they obtain prior EPA approval. Further, [FIFRA] permits "states to impose more stringent constraints on the use of EPA-approved pesticides than those imposed by the EPA," indicating that Congress was indifferent to regulation of these products through state tort law. In contrast, the [Cigarette Act] explicitly (i) applies to cigarettes only; (ii) mandates the precise language of the label; and (iii) prohibits any state from regulating any aspect of cigarette warnings.

Despite these differences, the pesticide manufacturers rely on the cigarette cases to contend that FIFRA both expressly and impliedly preempts failure to warn claims. The *Ferebee* court rejected both of these contentions and the Eleventh Circuit rejected the former. The Eleventh Circuit, however, is the first federal appellate court to find implied preemption by FIFRA. In so doing, it takes two extraordinary steps. First, the Eleventh Circuit bases its analysis on an unwarranted principle, that the presumption against preemption simply does not apply to im-

plied preemption. Second, it holds that pesticide warning claims are impliedly preempted even when the evidence shows that the EPA approved a pesticide's label based upon inaccurate and incomplete information submitted by the manufacturer.

This Court has long recognized that, where Congress has neither provided nor suggested a substitute method for traditional state common law damage claims for compensating injured victims, preemption of state tort law should not be found. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954). In the instant case, the Eleventh Circuit, with a single stroke of its pen, has rejected this long standing principle as well as the equally long standing principle that state common law is not preempted by Congressional enactment without a clear and unequivocal expression of Congress's intent to preempt. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Thus, under its rationale thousands of persons injured by defective and inadequately labeled pesticides, including the Papases, will no longer be able to seek redress for their injuries in the courts of the United States, or the various states, despite there being no clear congressional intent to eliminate such remedies.

This Court has granted review of the *Cipollone* decision regarding cigarette warning claim preemption. *See, Cipollone, supra.*

Here, it is even clearer that there is no preemption of plaintiffs' failure to warn claims. Given that there is a clear split of authority in the federal circuits and trial courts throughout the nation on the issue and in light of the important federal question presented by the instant case, this Court should also grant certiorari to review the Eleventh Circuit's ruling below. Alternatively, this Court should hold the instant petition for writ of certiorari in abeyance, pending resolution of *Cipollone*.

1. The Decision Below Conflicts With The Only Other Federal Circuit Court of Appeals Decision On The Issue And There Is A Wide Split Of Authority In The Federal District Courts And The State Courts On The Issue.

Prior to the decision below, the only federal circuit court decision on the preemptive effect of FIFRA on state common law warning claims was *Ferebee, supra,* in which the District of Columbia Circuit unequivocally held that FIFRA neither expressly nor impliedly preempted such claims. Other circuit courts, in cases not directly involving FIFRA, favorably noted the *Ferebee* decision. *See, e.g., Palmer, supra; Wells, supra.*

The Eleventh Circuit's opinion in the case at bar aknowledges that the decision is contrary to that reached in *Ferebee,* creating

a clear conflict in the federal circuits. Pet. App. 2. The opinion below also documents that there is a clear split of authority on the issue at the district and state court level. *See, Papas* Pet. App. 2.

In 1987, the first reported decision out of any federal court appeared which took exception with the holding in *Ferebee*. *Fitzgerald, supra*. In *Fitzgerald* the court, relying on *Cipollone, supra*, held that pesticide warning claims are expressly preempted by FIFRA. Since that time, federal district courts have sharply divided on the issue of FIFRA's preemptive effect on state common law warning claims, as the Eleventh Circuit noted in its decision.[6]

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[6] For example, federal district court cases holding that there is no preemption of such claims under FIFRA include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474 (D. Colo. 1990) (interlocutory appeal pending); *Evenson v. Osmose Wood Preserving, Inc. & American Wood Preserves Inst.*, 1990 WL 285756 (S.D. Ind. 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D. La. 1990); *Kerns v. Dow Chemical Co.*, C.V. No. 89-649-PA (D. Oregon 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Whitner v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Wilson v. Chevron Chem. Co.*, 1986 WL 2412 (S.D.N.Y. 1986). The Eleventh Circuit also noted federal district court cases finding preemption of some type to include: *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556 (E.D. Mo. 1990); *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799 (M.D. Fla. 1989) (decided by the same district judge who decided the instant case); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989); *Herr v. Carolina Log Bldgs., Inc.*, No. EV 85-262-1283 (S.D. Ind. Sept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D. Md. Nov. 8, 1988).

The situation in the state courts is equally confused. Several state court cases directly conflict on the issue of FIFRA preemption.[7]

Thus, a state of affairs exists whereby litigants in federal and state courts asserting common law claims relating to pesticide labeling and warnings, as well as defendants raising defenses to such claims, face a situation where it is wholly unpredictable as to whether the courts in their cases will find that their claims are preempted or will be permitted to proceed. This situation creates a strong incentive for forum shopping. It is also manifestly unjust, as certain injured parties will obtain recoveries, while others will not, and certain defendants will not be held liable, while others will, solely because of the particular forum in which their cases are pending.

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[7] State court cases finding no preemption of common law warning claims by FIFRA include *Perry v. Dow Chemical Co.*, (Cir. Ct. 15th Judicial Circuit, Palm Beach County, Fla., Case No. CL 88 10227 AN, June 30, 1989); *Packowski v. Orkin Exterminating Co.*, Case No. 85-46671-NI (Cir. Ct. Kent County, Michigan, May 5, 1989); *Privette v. Armour Exterminating*, (Cir. Ct. of the 15th Judicial Circuit, Palm Beach County, Fla., Case No. 85-6279-CA, February 26 and March 16, 1988). State court cases finding preemption include *Begley v. Truly Nolan Exterminating, Inc.*, 573 So.2d 1038 (Fla. 3d DCA 1991); *Tessman Seed and Chemical Co. v. State of Minnesota*, File No. C8-89-349 (Minn. D.C. 2nd Judicial District, July 9, 1990); *Merrill v. Dow Chemical Co.*, File No. PI88-2630 (D.C. 4th Judicial Circuit, State of Minnesota, County of Hennepin, May 1, 1990); *Dubois v. Ray's Feed Mill, Inc.*, File No. 8809140-NZ (Cir. Ct., Delta County, Mich., Jan. 26, 1990); *Lopez v. Chevron*, Case No. 89272 (Superior Ct., Venturi County, N.Y., Dec. 11, 1989); *Paul v. NCH Corp.*, Index No. 48262 (Sup. Ct., Niagara County, N.Y., Dec. 11, 1989); *Rogers v. Thumb Pest Control of Florida Inc.*, Case No. 88-3462 (Cir. Ct. 13th Judicial Circuit of Fla., Oct. 10, 1989); *Wixson v. Sonford Products Corp.*, Case No. 24,847 (Chancery Ct., Rankin County, Miss., May 1, 1989); *Bolduc v. Chemed*, Case No. 43-94-55 (Superior Ct., Orange County, Cal., April 10, 1989), *aff'd on other grounds*, (No. G00838, Ct. of Appeals 4th Appellate District, Cal., September 24, 1990); *Selvig v. Lentz Fertilizer, Inc.*, File No. 85CV456 (Cir. Ct., Dunn County, Wis., Dec. 26, 1988).

Given the diversity of judicial opinions on FIFRA's preemptive effect, this Court should intervene to finally decide the question and lend certainty to judicial proceedings throughout the nation. The district court and the Eleventh Circuit in the instant case recognized the same by virtue of the 28 U.S.C. § 1292(b) certification (joined in by Zoecon) and its acceptance. Accordingly, the issue is ripe for determination by this Court and ought to be decided.

2. The Preemption Analysis Conducted In The Decision Below Conflicts With The Analytical Framework For Preemption Analysis Established By Earlier Supreme Court Opinions And Other Circuit Court Opinions.

This Court has repeatedly made clear that preemption analysis begins with the assumption and presumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725 (1981). Recognizing the critical federalism principles at stake, this Court has consistently admonished the lower courts that there is a strong presumption against preemption of any type, and that preemption should not be found absent a clear and unequivocal statement of Congress's intent to preempt. *See, e.g., Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947); *Penn Dairies v. Milk Control Com.*, 318 U.S. 261 (1943). This is particularly true in areas traditionally governed by state and local law, such as the regulation of health and safety

matters, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), including the compensation of victims.[8]

This Court has also made it plain that the presumption against preemption is particularly strong in regard to state common law claims when a finding of preemption would leave injured victims without any remedy. *Silkwood, supra*; *United Construction Workers*, 347 U.S. at 663-64;. *Accord, Abbot by Abbot*, 844 F.2d at 1113. This Court has also repeatedly stated that the indirect regulatory pressure asserted by common law claims is far less intrusive on federal regulatory schemes than direct state regulation, and that Congress may quite reasonably preempt the latter, but leave the former intact. *English v. General Electric Co.*, 58 U.S.L.W. 4679, 110 S.Ct. 2270 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988); *Silkwood*, 464 U.S. at 256. Finally, this Court's decisions unequivocally establish that the presumption against preemption is equally applicable to express and implied preemption analysis. *See, e.g., Louisiana Public Service Comm'n. v. F.C.C.*, 476 U.S. 355 (1986); *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707 (1985).

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[8] Undoubtedly, there is an acute local interest in the instant matter, as evidenced by the appearance of the Attorney General of the State of Florida as *amicus curiae* in favor of the Petitioners in the proceedings below. This Court is also aware of the acute local interest in the regulation of pesticides, as it has accepted certiorari in the case of *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 750 (1991), to review the Supreme Court of Wisconsin's ruling that Wisconsin municipalities' regulation of pesticides is preempted by FIFRA.

Disregarding all of the above, the Eleventh Circuit based its preemption analysis on the erroneous principle set forth in its earlier decision in *Taylor,* 875 F.2d at 824, that the presumption against preemption does not apply in an implied preemption analysis and that, regardless of what Congress said, implied preemption can be found solely on the basis of effects. The court's decision to discard the presumption against preemption is, of course, directly contrary to well-established principles of federalism, this Court's precedents, and the holding of numerous other federal circuit courts. *See, e.g., Associated Industries of Massachusetts v. Snow,* 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. New York City,* 855 F. 2d 48 (2d Cir, 1988). It also makes no sense. If anything, courts should be more hesitant to find preemption of state law when they are inferring Congress's intent from its actions than when they are when interpreting its express words.

The Eleventh Circuit compounded this fundamental error by automatically equating the indirect regulatory pressure arguably created by plaintiffs' tort claims with the unquestionable interference with federal regulation created by direct, contradicting state regulations. In the Eleventh Circuit's view, plaintiffs' common law claims must be preempted because Congress preempted state regulations and plaintiffs' claims might have the same regulatory impact. Established preemption doctrine

recognizes the difference between tort law and regulatory law, however, and says that Congress does not automatically preempt the former when it preempts the latter, despite the latter's arguable regulatory impact. *See, e.g., English, supra; Goodyear Atomic Corp., supra; Silkwood, supra.*

3. Whether Congress Intended FIFRA To Preempt State Common Law Of Inadequate Labeling Claims Is An Important Federal Question, Which Was Wrongly Decided Below.

The Eleventh Circuit's finding of implied preemption in this case is predicated on two basic conclusions. The first is that the federal government had completely occupied the entire field of pesticide labeling, leaving no room for state common law to augment FIFRA. The second is that jury awards of damages would directly conflict with federal law because state common law suits for inadequate labeling will stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

The conclusion that the federal government has occupied the entire field of pesticide labeling is a totally unprecedented and unwarranted finding. This Court has repeatedly found that federal regulations far more comprehensive than those at issue here do not occupy the entire field, much less preempt state common law claims for damages. *See, e.g., English, supra; Pacific Gas Electric Co. v. State Energy Resources Conservation &*

Development Comm., 461 U.S. 190 (1983); *Silkwood, supra.* Indeed, if the Eleventh Circuit's conclusion is correct, then pesticide manufacturers would even be immune from state criminal prosecution for fraud in connection with their warning labels, regardless of the outrageousness of their conduct, since federal law which has occupied the entire field, warranted it. *See, English,* 110 L.Ed. 2d at 80.

In determining that state common law suits for inadequate labeling would stand as an obstacle to FIFRA's purpose, the Eleventh Circuit failed to take notice of Congress's overriding intent in enacting the legislation. The essential purpose of FIFRA is to protect individuals and the environment from toxic effects associated with pesticide use and to prevent deceptive labeling. H.R. Rep. No. 939 100th Cong. 2d Sess. (1988) 26-27 *reprinted in* 1988, U.S. Cong. and Ad. News, 3475-3476. *See, also, National Agr. Chemicals Ass'n v. Rominger,* 500 F. Supp. 465 (E.D. Cal. 1980). The Eleventh Circuit's opinion improperly subordinates that purpose to Congress's desire for uniformity in labeling, but in fact, uniformity of labeling was not particularly important to Congress. Indeed, FIFRA noted, does not preclude manufacturers of identical products from using vastly different labels, as long as each submits its label to EPA for approval. The Eleventh Circuit also improperly equates a jury finding that a manufacturer must pay damages with an order that it must change its label. As a result, it imposes a rule under which

manufacturers escape liability even if their labels are woefully deficient, as long as the EPA approved them.

This rationale is completely at odds with the District of Columbia Circuit's recognition in *Ferebee* that pesticide manufacturers can, if they wish, continue to use their old labels (without seeking to change them pursuant to FIFRA) and pay damages for the resulting injuries. *See, also, Goodyear Atomic Corp.*, 486 U.S. at 185-186, dismissing the argument that preemption must be found if a manufacturer can comply with federal law and still be required to pay state law based damage awards. It also disregards the fact that, as *Ferebee* recognized, allowing state common law awards for inadequate labeling does not interfere with Congress' objectives in enacting FIFRA, but, rather, furthers Congress's paramount purpose of safety by piquing the interest of the EPA and giving manufacturers an incentive to formulate and propose more adequate labels and warnings.

The Eleventh Circuit's analysis similarly fails to acknowledge that Congress extensively amended FIFRA in 1988, after the *Ferebee* decision and with full knowledge of its holding, but did not alter FIFRA's provisions relating to labeling other than to add the heading "Uniformity". By so doing, Congress ratified and accepted the interpretation in *Ferebee*. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

Congress was also aware in 1988 of the EPA's inability to adequately deal with inert ingredients (the culprit in the instant

case) contained in pesticide formulations, its failure to conduct sufficient chronic toxicity testing of pesticides, and its general inability to adequately regulate the numerous pesticides marketed in the United States. *See*, United States General Accounting Office, Report to Congressional Requesters, Pesticides, EPA's Formidable Task To Assess And Regulate Their Risks (April 1986). In light of Congress's awareness of the *Ferebee* decision and the EPA's inability to adequately cope with the hazards posed by pesticides, as well as Congress's failure in 1988 to make clear an intent to preempt state common law tort claims, one can only conclud that Congress simply did not intend that warning claims be preempted.

The Eleventh Circuit's ruling effectively means that, in many cases, persons injured by pesticides will have no remedy whatsoever. There is no private remedy under FIFRA. *Nader v. U.S. E.P.A.*, 859 F.2d 747 (9th Cir. 1988); *Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030 (9th Cir. 1985); *Fiedler v. Clark*, 714 F.2d 77 (9th Cir. 1983); *In Re: Agent Orange Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980). This radical shift from the traditional state and federal balance of powers -- and the elimination of remedies for pesticide poisoning victims -- can not be what Congress intended when it enacted FIFRA, which, of course is totally silent on the subject of the preemption of state common law remedies.

Indicative of the Supreme Court's admonishments against

implied preemption resulting in the eradication of state common law remedies is this Court's decision in *Silkwood*, which stated at 251:

> [I]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

Even the dissenting justices in *Silkwood*, who believed that Congress had intended to preempt punitive damage awards, refused to attribute to Congress an intent to preempt compensatory damage claims stating:

> [I]t is inconceivable that Congress intended to leave victims with no remedy at all....

Id. at 263 (Blackmun, J. dissenting).

The Eleventh Circuit's decision in the case at bar has resulted in such an inconceivable situation. It should not be allowed to stand.

4. Whether Congress Intended FIFRA To Preempt State Common Law Inadequate Labeling Claims Where The EPA Has Registered A Product And Approved Its Label On The Basis Of False Or Inaccurate Information Is Also An Important Federal Question, Which Was Wrongly Decided Below.

The plaintiff in this case, Minas Papas, is suffering from benzene poisoning. As the petitioners have noted, while the EPA did register Zoecon's product and approved the label, discovery

has revealed that the EPA was never informed that Zoecon's product contained benzene in extremely dangerous quantities. In *Hurley*, 863 F.2d at 1180, the Fifth Circuit, considering the preemptive effect of an FDA approved label, held that there is no preemption under the FDCA in such circumstances. It ruled that summary judgment must be denied where a factual issue remains as to whether the manufacturer provided the agency with all necessary and available information about the proposed product.

The Eleventh Circuit's decision below rejects the Fifth Circuit's rationale, holding that the question of whether the EPA was provided with complete and accurate information is simply a matter to be resolved between the EPA and the manufacturer. Pet. App. 12. This leaves an injured party with no compensation even in the extreme case in which a manufacturer purposely defrauded the EPA. A manufacturer could only be sanctioned by the EPA, and only in the event that the agency discovered such a state of affairs, which is often times only discovered through inquiries made in connection with civil tort litigation.

The Eleventh Circuit's decision also ignores the practical realities involved when manufacturers submit proposed labels to the EPA for approval. Marketing pressures are present whereby manufacturers will seek approval of labels containing the least ominous warnings, so as not to have consumers avoid

purchasing products which warn of potential dire consequences when used. This would particularly be the case if manufcturers are immunized from suit, as results from the Eleventh Circuit's ruling. Thus, the label borne by Zoecon's seemingly innocuous product warned neither of its benzene content nor the serious health disorders which could result from exposure.

In the instant case, the Eleventh Circuit's ruling creates a particularly anomalous result because, as we have noted, Zoecon's formulation was initially registered as a pesticide, and its label approved by the EPA, while Upjohn's product was determined to be a new animal drug, and its label was approved by the FDA. *See*, 7 U.S.C. § 136(u). Nevertheless, the products performed essentially the same function, i.e., dips for dogs to rid the dogs of fleas, lice, vermin and dermatological disorders. Thus, the regulatory determination as to whether products such as these are to be considered as a pesticide or a new animal drug itself determines whether a remedy exists for inadequate warnings, i.e., a claim for an inadequately labeled pesticide is preempted, whereas a claim relating to new animal drug regulated by FDA is not necessarily preempted. Surely, Congress could not have intended the decision as to whether the EPA or the FDA approves the label to be dispositive.

For the Eleventh Circuit to find common law warning claims are preempted by FIFRA, while a vast body of case law holds that such claims are not preempted by the FDCA given the

similarity of the acts, is completely illogical. To find FIFRA preemption one must determine, as the Eleventh Circuit did, that Congress designated the EPA as being omniscient on the subject of pesticide safety and the *sine qua non* on the subject. However, since there is no FDCA preemption, it must be assumed that Congress did not consider the FDA to have similar expertise in the area of food, drugs and cosmetics, products which come into even more direct contact with human beings than pesticides. As the court noted in *Ferebee*, unless FIFRA can be viewed as an affirmative subsidization of the pesticide industry which commands states to accept EPA approved pesticides and their labels, it cannot be reasoned that FIFRA preempts common law warning claims. Moreover, from the facts in this case, which establish that EPA was uninformed about Paramite's benzene content, it is easy to see that EPA's approval of labels is not the last word in product safety.

Indicative of the incongruous reasoning conducted by the Eleventh Circuit is that court's apparent agreement with the holding in *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989). In *Jorling*, the Second Circuit held that additional written warning requirements imposed by New York state law were permitted by FIFRA's use regulation provisions, despite FIFRA's express prohibition of direct state regulation of labeling. While petitioners have no quarrel with that ruling, it is astounding that the Eleventh Circuit cites it with approval.

The New York regulations at issue in *Jorling* required written warnings to be posted at the location of the application of the pesticide. FIFRA defines labeling as "all labels and other written, printed or graphic matter accompanying the pesticide . . . at any time", 7 U.S.C. § 136(p). How such arguably direct state regulation of labeling and warnings could not be found to run afoul of FIFRA's provisions, while the Papases' common law claims for damages for inadequate warning can be said to violate Congress's intent in creating those provisions is a result which cannot be explained.

Such illogic permeates the decision below, which leaves injured parties without remedies and gives no incentive for manufacturers to formulate safe products and adequate labels, despite there being no evidence whatsoever that this was Congress' intent when it enacted FIFRA. Congress was well aware of its power to preempt and the means by which to accomplish such preemption. It simply did not preempt state common law failure to warn claims relating to pesticides.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should hold the instant petition in abeyance, pending the resolution of *Cipollone*.

Respectfully submitted,

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May 27, 1991

APPENDIX

Minas H. PAPAS, Ollie M. Papas, his wife, Plaintiffs–Appellants

v.

The UPJOHN COMPANY, a Delaware corporation qualified to do business in the state of Florida, Zoecon Corporation, a Delaware corporation currently doing business in the State of Florida, Defendants-Appellees.

No. 89-3752.

United States Court of Appeals,
Eleventh Circuit.

Feb. 28, 1991.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

Minas and Ollie Papas ("Papas") filed a diversity action in federal district court against the Upjohn Company and Zoecon Corporation. The complaint alleged that Minas, while working for a humane society had applied certain pesticides manufactured by Upjohn and Zoecon to dogs to rid the dogs of fleas, ticks, and other pests. The complaint also alleged that these chemical products caused him to suffer health problems. The complaint sounded in negligence, strict liability, and breach of implied warranty of merchantability, and included a derivative claim for loss of consortium. The three main counts were, in whole or in part, claims of inadequate labeling in the light of alleged dangers arising from exposure to the pesticides.

Zoecon moved for partial summary judgment on the labeling claims. It argued that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y ("FIFRA"), under which its product is registered, preempted such claims. The district court agreed and granted Zoecon's motion. Having determined

that this issue involves a controlling question of law on which there are substantial grounds for difference of opinion[1] and that an immediate appeal would materially advance the ultimate determination of the litigation, the district court certified the matter for interlocutory appeal, pursuant to 28 U.S.C.A. § 1292(b). We granted the petition to appeal, and the appeal followed. We conclude that state common law tort claims for inadequate labeling are impliedly preempted by FIFRA and, accordingly, affirm the district court's grant of partial summary judgment.

I. THE DOCTRINE OF FEDERAL PREEMPTION

Federal preemption of state law is based on the supremacy clause of the Constitution:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. VI, cl. 2. Preemption can be either express or implied; it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and

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[1] Only one federal appellate court has considered the issue: in *Ferebee v. Chevron Chemical Company* 736 F.2d 1529 (D.C.Cir.1984), the court concluded that FIFRA did not preempt state common law tort suits based on inadequate labeling. District courts are split on the issue. Cases finding preemption include *Hurt v. Dow Chem. Co.*, No. 90-0783-C(3) (E.D.Mo. Sept. 28, 1990); *Kennan v. Dow Chem. Co.*, 717 F.Supp. 799 (M.D.Fla. 1989); *Fisher v. Chevron Chem. Co.*, 716 F.Supp. 1283 (W.D.Mo. 1989); *Herr v. Carolina Log Bldgs., Inc.*, No. EV 85-262-C (S.D.Ind. Dept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D.Md. Nov. 8, 1988); and *Fitzgerald v. Mallinckrodt, Inc*, 681 F.Supp. 404 (E.D.Mich. 1987). Cases in which district courts found no preemption include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F.Supp. 1474 (D.Colo. 1990); *Evenson v. Osmose Wood Preserving, Inc. & American Wood Preservers Inst.*, No. IP 87-383-C (S.D.Ind. Sept. 18, 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D.La. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F.Supp. 85 (E.D.Pa. 1989); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D.Ill. 1989); *Roberts v. Dow Chem. Co.*, 702 F.Supp. 195 (N.D.Ill. 1988); and *Wilson v. Chevron Chem. Co.*, 1986 WL 14925 (S.D.N.Y. 1986).

purpose." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).

> Preemption can be inferred
>
> (1) "when there is outright or actual conflict between federal and state law;"
>
> (2) "where compliance with both federal and state law is in effect physically impossible; "
>
> (3) "where there is implicit in federal law a barrier to state regulation;"
>
> (4) "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law;" or
>
> (5) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. "

Louisiana Public Service Comm'n v. F. C. C., 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986) (citations omitted); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 491-92, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987); *Hillsborough County, Fla. v. Automated .Med. Labs.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *De La Cuesta*, 458 U.S. at 153, 102 S.Ct. at 3022; *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 825-26 (llth Cir.1989); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (llth Cir.1987). A state law - even if it has the same ultimate goal as a federal law - may, stand as an obstacle to the full implementation of a federal law and therefore be preempted "if it interferes with the methods by which the federal statute was designed to reach this goal" *Ouellette*, 479 U.S. at 494, 107 S.Ct. at 813.

The principle of implied preemption "applies whether the federal law is embodied in a statute or regulation, and whether the state law is rooted in a statute, regulation, or common law rule." *Taylor*, 875 F.2d at 826 (citations omitted). *Accord Ouellette*, 479 U.S. at 494-95, 499 n. 20 107 S.Ct. at 813, 815 n. 20 (state nuisance suits preempted by Clean Water Act); *Louisiana Public Service Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1898-99 (federal

agency action may preempt state regulation); *Automated Med. Labs.*, 471 U.S. at 713, 105 S.Ct. at 2375 (federal regulations can preempt state law); *Cipollone v. Ligget Group, Inc.*, 789 F.2d 181, 187 (3d Cir.1986) (state common law damage actions can have effect of imposing requirements which create obstacle to accomplishment of "full purposes and objectives of Congress") (decision and reasoning adopted by Eleventh Circuit in *Stephen v. American Brands, Inc.*, 825 F.2d at 313). Thus, we have recognized that the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor*, 875 F.2d at 824 n. 16 (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)).

The critical question in considering whether state law is preempted by federal law is Congressional intent –that is, "whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1899. "[I]n implied preemption analysis it is possible to infer preemptive intent solely from effects": even if statutory language or legislative history is unclear, federal law preempts state law if "the ordinary application of the two laws creates a conflict." *Taylor*, 875 F.2d at 826.

II. THE FIFRA SCHEME Of PESTICIDE REGULATION AND LABELING

FIFRA, initially enacted in 1917, was completely revised in 1972, when the responsibility for its enforcement was transferred to the Environmental Protection Agency ("EPA") from the Department of Agriculture. The Senate Committee on Agriculture and Forestry, to which the bill was referred, identified two purposes of the 1972 revisions to FIFRA: to "(A) regulate the use of pesticides to protect man and his environment; and (B) extend Federal pesticide regulation to actions entirely within a single State." S.Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. At that time, FIFRA was amended to define "protect health and the environment" and "protection of health and the environment" as "protection against any unreasonable adverse effects on the environment." 7 U.S. C.A. § 136(x). "Unreasonable adverse effects on the environment" was, in turn, defined as "any unreasonable risk to man or the environment, taking into account

the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C.A. § 136(bb).

FIFRA's legislative history indicates that Congress intended to establish a comprehensive regulatory scheme in which the EPA Administrator would be responsible for determining whether to register a pesticide and, if so, under what circumstances. Congress recognized that the control of pesticides required a careful balancing of benefit against risk:

> While appropriate pesticides properly used are essential to man and his environment, many constitute poisons that are too dangerous to be used for any purpose. Others are dangerous unless used extremely carefully . . . Pesticides therefore have important environmental effects, both beneficial and deleterious. Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential.

S.Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted* in 1972 U.S. Code Cong. & Admin.News at 3996. The EPA administrator was designated as the entity to conduct the balancing analysis:

> The question [the Administrator] must decide is "Is it better for man and the environment to register this pesticide, or is it better that this pesticide be banned?" He must consider hazards to farmworkers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain when it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort and health of man. All these factors he must consider, giving each its due. No one should be given undue consideration, no one should be singled out for special mention, no one should be considered a "vital" criterion.
>
> For each pesticide the Administrator must ask the same question.... In each case the Administrator must take into account all relevant factors and decide whether it is better for man and the environment that this product be registered.

Id. at 4032-33. Under FIFRA, the Administrator is required to register a pesticide if he determines that, when considered with any restrictions imposed on it, the pesticide warrants the proposed

claims made for it; its labeling and other materials comply with FIFRA requirements; it will perform its intended purpose without unreasonable adverse effects on the environment; and when used in accordance with common practice, it will not generally cause unreasonable adverse effects on the environment. *See 7 U.S.C.A. § 136 a(c)(5).*

In this comprehensive regulatory scheme for pesticides, Congress delineated the extent to which the states could regulate pesticides in section 136v:

> § 136v. Authority of States
>
> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c) Additional Uses
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator....

7 U.S.C.A. § 136v (West 1980 & Supp.1990) (subsection headings added by 1988 amendment).

The statute's language, by itself, is a powerful limit on state power over labeling. A report accompanying the bill, as originally reported out of the House Committee, also indicated the limits on state power due to the division of authority between the federal and state governments: "In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee had adopted language which is intended to completely preempt State authority in regard

to labeling and packaging." H.R.Rep. 92-511, 92d Cong. 1st Sess. 16 (1971). Congress recognized that, while the intent of this provision was "to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act," subsection (b) preempted "any State labeling or packaging requirements differing from such requirements under the Act." S.Rep. 92-838, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News at 4021 (emphasis supplied); see also S.Rep. 92-970, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News 4092, 4128.

FIFRA directs that States "shall not impose or continue in effect any requirements for labeling or packaging" beyond the requirements imposed by FIFRA. Given FIFRA's words and its legislative history, FIFRA may expressly preempt state common law actions of the kind before us, just as FIFRA preempts other legal requirements in the form of state statutes and regulations. But, mindful that "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," *Taylor*, 875 F.2d at 824, we admit to a little uncertainty and pass over the question of express preemption. Instead, we will decide whether federal preemption of state common law tort claims based on labeling deficiencies can be inferred from FIFRA and the labeling regulations promulgated under it.

III. STATE COMMON LAW TORT LABELING CLAIMS IMPLIEDLY PREEMPTED BY FIFRA

Under FIFRA, the federal government— through the EPA— has the sole and exclusive right to regulate pesticide labels. While states can regulate the sale or use of federally registered pesticides, no state can "impose or continue in effect any requirements for labeling or packaging [of pesticides] in addition to or different from" those required by FIFRA. 7 U.S.C.A. § 136v(b).

In 40 C.F.R. Part 156, the EPA has regulated almost every aspect of pesticide labeling. The EPA specifically regulates the manner in which warnings and precautionary statements for the pesticides are to be presented and provides specific requirements about the content, placement, type size, and prominence of the warnings and precautionary statements. *See* 40 C.F.R. § 156.10(h) (1990). These warnings and precautionary statements concern the toxicological hazards of the pesticide, including "hazard to

children, environmental hazard and physical and chemical hazard." *Id.* The EPA also requires that a statement of practical treatment (that is, first aid or other treatment) for each pesticide appear on the label. 40 C.F.R. § 156.10(h)(1)(iii). Additional warnings and precautionary statements about risks to humans are required under the heading "Precautionary Statements" and the subheading "Hazard to Humans and Domestic Animal."[2] Typical precautionary statements are prescribed which must be modified or expanded to reflect specific hazards." *See* 40 C.F.R. § 156.10(h)(2)(i)(B) and table.[3] In addition, the EPA requires that pesticide labels must contain directions for use stated in terms "which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide." 40 C.F.R. § 156.10(i)(1)(i). These directions, when followed, "must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment." *Id.*[4] It is in the light of these comprehensive regulations that the EPA approves a specific label for each pesticide.

We conclude that FIFRA impliedly preempts state common law tort actions based on labeling claims in several ways. First, having considered FIFRA's express prohibition of state labeling requirements in addition to those required under FIFRA, 7 U.S.C.A. § 136v(b), and having examined the labeling regulations adopted

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[2] The EPA requires that if a hazard exists to humans or domestic animals, these precautionary statements must indicate (1) "the particular hazard," (2) "the route(s) of exposure," and (3) "the precautions to be taken to avoid accident, injury or damage." 40 C.F.R. § 156.10(h)(2)(i)(A). The precautionary statements indicate whether protective equipment or garments are necessary when applying the pesticide.

[3] A pesticide is considered misbranded if "the label does not contain a warning or caution statement which may be necessary" and which if complied with, "is adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(G). A manufacturer is subject to penalties under FIFRA if its pesticide is misbranded.

[4] In addition, a pesticide is considered misbranded—and a manufacturer subject to various penalties, including registration revocation—if the labeling "does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with ... are adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(F). "The basic purpose of the statute [is] to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions." *Roberts v. Dow Chemical Co.* 702 F.Supp. 195, 196 (N.D. Ill.1988) (quoting *Continental Chemiste Corp. v. Ruckelshaus* 461 F.2d 331, 335 (7th Cir.1972)).

pursuant to FIFRA, see *supra*, we hold that the federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

We also hold that jury awards of damages in such tort actions would result in direct conflict with federal law. For EPA registered pesticides, the warning and use statements present on the labels indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *See* 7 U.S.C.A. §§ 136(q)(1)(F), 136(q)(1)(G), 136(bb); 40 C.F.R. §§ 156.10(h), 156.10(i). Thus, a jury determination, via a state common tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate to protect against health risks. Such a jury determination is also in direct conflict with the Congressional intent that *the* EPA *Administrator* determine the reasonableness of the risks to man and the environment posed by pesticides, at least with respect to the labeling of pesticides.[5]

In addition, allowing state common law tort suits for inadequate labeling would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." One of the EPA's objectives in its labeling regulations is the uniformity of labeling

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[5] The states are specifically permitted to make such determinations with respect to the "sale or use" of pesticides, as long as they do not permit any sale or use prohibited by the federal government under FIFRA. *See* 7 U.S.C.A. § 136v(a). *New York State Pesticide Coalition Inc. v. Jorling* 874 F.2d 115 (2d Cir.1989), is instructive about the respective authority of the state and federal governments to regulate pesticides under FIFRA. In *Jorling* the Second Circuit upheld certain state notification requirements placed on commercial pesticide applicators. It noted that "[t]he states have joint control with the federal government in regulating the use of pesticides, for the safety of its citizens and the environment . . . with the exception of the EPA's exclusive supervision of labeling." 874 F.2d at 118 (citation omitted). It drew a distinction between FIFRA labeling which "is designed to be read and followed by the end user," and notification requirements—regulation on pesticide use—placed on particular end users (professional pesticide applicators) which require them to provide certain information to those who contract to have pesticide applied, and to members of the public who may be exposed to the chemicals as a result of their application to public areas. *Id.* at 119.

across the nation and among (1) different brands of the same pesticide, (2) different pesticides performing the same function, and (3) different pesticides posing the same or similar risks to health and the environment. *See* 40 C.F.R. Part 156[6] This objective of achieving uniformity in labeling was endorsed by Congress: in 1988, without changing the language of § 136*v*(b) which prohibits state regulation of pesticide labeling and packaging, Congress added the heading "Uniformity" to this section. A jury determination that a label was inadequate would require that the manufacturer change the label or risk additional suits for damages. Such a change, if permitted by the EPA, would destroy the uniformity that Congresss and the EPA seeks to achieve in pesticide labeling because the warning label for that pesticide would not be based on the same criteria the EPA uses to establish warnings for all other pesticides.

It might be possible for a manufacturer to comply with both federal regulations and the requirements of state common law as dictated by state law damages awards against pesticide manufacturers, *see Ferebee*, 736 F.2d at 1541-42, but the pressure of such awards would interfere with the EPA's regulatory process because manufacturers would likely press the EPA to change its labeling requirements to reflect the jury awards so as to free the manufacturer from future tort liability for the same jury-found "inadequacies" in labeling. *See Kennan v. Dow Chem. Co.*, 717 F.Supp. 799, 806-07 (M.D.Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404, 107 (E.D.Mich.1987); *see also Palmer v. Liggett Group, Inc.* 825 F.2d 620, 627-28 (lst Cir.1987) (damages awards

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[6] This desire for uniformity is particularly evident in the regulation of pesticide warnings. Pesticides are grouped into four human toxicity categories based on selected hazard indicators, which include oral, inhalation, and dermal toxicity indicators and the effects of pesticide contact with eyes or skin. See table at 40 C.F.R. § 156.10(h)(1). The text of the warning on the front panel of the label is based on the pesticide's toxicity category. 40 C.F.R. § 156.10(h)(1). EPA regulations dictate which of four signal words can be used on the front panel of the label, depending on the toxicity category into which the pesticide falls—"Danger" and/or "Poison" for category I; "Warning" for category II; and "Caution" for categories III and IV. 40 C.F.R. §§ 156.10(h)(1)(i)(A)—156.10(h)(1)(i)(D). A pesticide manufacturer is *not* allowed to use "signal word(s) associated with a higher Toxicity Category" on its label, unless the EPA determines that "such labeling is necessary to prevent unreasonable adverse effects on man or the environment." 40 C.F.R. § 156.10(h)(1)(i)(E). In addition, a manufacturer cannot put more than one human hazard signal word on the front panel of the label. *Id.*

for inadequate labeling preempted by Federal Cigarette Labeling and Advertising Act). This case-by-case, state-by-state outside pressure on the regulatory process would hinder the development of an orderly, systematic, and uniform nationwide labeling scheme.

In this way, state common law tort suits based on labeling claims would also "stand as an obstacle to the accomplishment and execution of the full objectives of Congress" even if such suits led to "better" or "more adequate" labels, thereby serving FIFRA's goal of regulating pesticides "to protect man and his environment." A state law action which shares the same purpose as the federal law in question is preempted if it attempts to achieve that purpose by a method which interferes with the federal methods; as the Supreme Court said in *Ouellette,*

> it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

479 US. at 494, 107 S.Ct. at 813. For the labeling of pesticides, the EPA evaluates the toxicological data of any individual pesticide in comparison with the toxicological data for other pesticides, to achieve the protection of "man and his environment" through a labeling system that is uniform and consistent across the broad spectrum of pesticides. A jury's imposition of damages in a state tort suit premised on labeling claims would disrupt the methods by which FIFRA protects man and the environment because it would inject irrelevant considerations into the EPA's evaluation of a pesticide and its labeling and would second guess the EPA's conclusions.[7]

Allowing state common law tort actions based on labeling claims would permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose

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7. As the Supreme Court noted in the context of the Clean Air Act,

> [s]uch penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits.... If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability.... The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state concerns.

Ouellette 479 U.S. at 495, 107 S.Ct. at 813.

requirements for labeling pesticides. As we have stated before, the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor*, 875 F.2d at 824 n. 16. Considering our understanding of Congress's intent, we decline to permit such state regulation.

IV. CONCLUSION

We hold that FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides to the extent that such actions are based on claims of inadequate labeling.[8]

The judgment of the district court is AFFIRMED.

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[8] Papas contends that even if we hold that FIFRA preempts state common law tort suits based on labeling claims, we should recognize an exception for instances in which, as Papas says exists here, a manufacturer has failed to provide the EPA with complete information on the pesticide. *See Hurley v. Lederle Labs. Div. of American Cyanamid Co.* 863 F.2d 1173, 1179-80 (5th Cir.1988). To the extent that *Hurley* purports to recognize an exception to federal preemption of common law tort labeling claims when the federal statute involved explicitly prohibits state regulation of labeling and the federal agency has received incomplete information from the manufacturer, we reject its holding at least as applied to FIFRA-regulated pesticides. Given the FIFRA regulatory scheme, it would be up to the EPA—and not a jury—to determine first (1) whether the information provided was incomplete or inaccurate; (2) whether the omitted information is significant enough to mandate a change in the label; and (3) how, if at all, the label should be corrected.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MINAS H. PAPAS and OLLIE M. PAPAS, his wife,

Plaintiffs,

vs. Case No. 86-116-Civ-J-14

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida, and ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Defendants.

ORDER AND PARTIAL SUMMARY JUDGMENT

I. Defendant's Motion For Partial Summary Judgement

This case came on to be heard on Defendant Zoecon Corporation's Motion For Partial Summary Final Judgment, filed April 10, 1989; Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989; and plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989. The Court heard oral argument on May 26, 1989.

Defendant Zoecon argues that plaintiffs' claims for negligence, strict liability, and implied warranty are preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, [hereinafter "FIFRA"], to the extent that the claims are based on defendant's failure to warn about the dangers of Paramite. The Court shall review the legislative history of FIFRA and determine whether or not FIFRA preempts plaintiff's claims based on defendant's failure to warn.

A. Standard To Be Applied On Summary Judgment

A district court's review of a case on a motion for summary judgment is governed by Fed.R.Civ.P. 56. A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the district court that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Fed.R.Civ.P. 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. 477 U.S. at 325. When a moving party has so discharged its burden, the nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 324.

The district court must enter summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the

burden of proof at trial." 477 U.S. at 322; Fed.R.Civ.P. 56(c). *See also Reflectone, Inc. v. Farrand Optical Co., Inc.*, 862 F.2d 841, 843-4 (11th Cir. 1989). Whether or not the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, requires the court to draw inferences from the evidence as viewed in the light most favorable to the nonmoving party, and to resolve all reasonable doubts in that party's favor.

The Eleventh Circuit Court of Appeals explained the reasonableness standard in *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988):

> In deciding whether an inference is reasonable, the court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." . . . The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. . . . When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

842 F.2d at 1270 (citations omitted).

Fed.R.Civ.P. 56(c) requires the district court to deny a motion for summary judgment if the court finds that there exists a genuine issue for trial. What constitutes a "genuine issue for trial" was addressed by the Supreme Court in *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court stated that "summary Judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. The Court further stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-52.

The Court finds that the parties have had adequate time to conduct discovery in this case. The Court will, therefore, address the motion for partial summary judgment.

B. Preemption Of State Tort Law By FIFRA

1. The Concept of Federal Preemption

The doctrine of preemption is based on Article VI, Clause 2 of the United States Constitution which provides:

> The Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding .

Preemption is deemed mandatory when Congress expresses a clear intent to preempt state law, where there is a conflict between state and federal law, where compliance with both state and federal law is impossible, where federal law implicitly bars state regulation, where Congress has legislated comprehensively, or where state law serves as an obstacle to federal objectives. *Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-69 (1986) *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). This Court has recognized that, in deciding whether a federal statute preempts state law, "the Court must ascertain Congressional intent in enacting the federal statute at issue." *Blue Cross and Blue Shield of Florida. Inc. v. Department of Banking and Finance*, 613 F. Supp. 188, 191 (M.D. Fla. 1985), *aff'd* 791 F.2d 1501 (11th Cir. 1986). An analysis of the legislative history and the specific provisions of FIFRA reveals that in enacting FIFRA Congress expressly intended to preempt state labeling requirements.

2. Legislative History of FIFRA

FIFRA represents the federal government's detailed comprehensive system for the strict regulation of pesticides. FIFRA was enacted in June, 1947, to replace and expand the protection afforded by the Insecticide Act of 1910, the first federal act regulating the pesticide industry. H.R. Rep. No. 313, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1200, 1201. The 1947 Act gave the United States Department of Agriculture authority over the regulation, registration and labeling of "economic poisons and devices."

In 1972, FIFRA was completely revised. Responsibility for enforcement of FIFRA was transferred from the Department of

Agriculture to the newly created Environmental Protection Agency [hereinafter "EPA"]. The two major goals of the 1972 revisions were to "regulate the use of pesticides to protect man and his environment" and to "extend Federal pesticide regulations to actions **entirely within a single State.**" S. Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993 (emphasis added). The intent to create a comprehensive regulatory statute is demonstrated by the President's environmental message included in the Senate report on the proposed 1972 Act. It noted, in pertinent part, that:

> Currently, Federal controls over pesticides consist of the regulation of the registration and labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act. The administrative processes contained in the law are inordinately cumbersome and time consuming, and there is no authority to deal with the actual use of pesticides. The labels approved under the Act specify uses to which pesticide may be put, but there is no way to insure that the label will be read or obeyed. The comprehensive strengthening of our pesticide control laws is needed.

S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4093-94.

Both the House and Senate bills explicitly detail the desire for federal preemption concerning labeling. The House bill provides:

> Section 23. AUTHORITY OF STATES
>
> Subsection (b) preempts any State labeling or packaging requirements differing from such requirements under the Act.

H.R. 10729, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4010, 4021 (emphasis added). Similarly, the Senate bill provides:

> Section 24. AUTHORITY OF STATES
>
> Subsection (b) **preempts any State or local government labeling or packaging requirements** differing from such requirements under the Act.

S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4128 (emphasis added). Therefore, it is clear that the express intent of Congress in enacting the 1972 revisions to FIFRA was to preempt state regulation of labeling requirements. The authority to promulgate such regulations was reserved exclusively for the EPA.

3. Preemption Of State law By FIFRA

FIFRA is explicit as to the preemption of state authority to regulate pesticide labeling. It specifically provides that:

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). The statutory language of FIFRA creates a prohibition of "any requirements for labeling" by states. Similarly FIFRA'S legislative history demonstrate a definitive congressional mandate that the regulation of pesticide labeling be controlled solely by the EPA.[1] It is clear that Congress has legislated comprehensively, barring the states from interfering with the regulation of pesticide labels .

4. Judicial Precedent in Support of FIFRA Preemption

FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald v. Mallinckrodt*, 681 F. Supp. 404 (E.D. Mich. 1987). In *Fitzgerald* plaintiff alleged personal injuries resulting from his exposure to defendant's chemical product, Calo-Clor, during the course of his

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[1] Pursuant to FIFRA, the EPA has enacted a series of regulations. Pursuant to 7 U.S.C. § 136a(c)(5)(C), the administrator of the EPA shall register a pesticide if he determines, *inter alia*, that it will perform its intended function without "unreasonably adverse effects" on man or the environment. A pesticide that is duly registered with the EPA must bear a label which contains EPA-approved warnings that the product is adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(G). Moreover, a label cannot contain language that is not approved by the EPA. 40 C.F.R. 162.10(a) Pursuant to the regulations promulgated under FIFRA, the EPA not only specifies the particular warning language required, *see* 40 C.F.R. § 162.10(a)(1), but also the type size, *see* 40 C.F.R. 162.10(a)(2)(ii)(A), color, *see* 40 C.F.R. 162.10(a)(2)(ii)(B), and placement, *see* 40 C.F.R. 162.10(a)(4), of the warning and all other specifications concerning labeling.

employment. Calo-Clor is an inorganic mercury-based fungicide which was registered with the EPA pursuant to FIFRA.

In granting summary judgment to the defendant on the basis of preemption, the Court recognized that in enacting FIFRA "Congress had **enacted a comprehensive system** for the registration and labeling of pesticides." 681 F. Supp. at 406 (emphasis added). The Court determined that "any state law tort recovery based on failure to warn theory, would abrogate the Congress' intent to provide uniform regulations governing the labeling of pesticides." *Id.* at 407.

In reaching its conclusion that state tort claims were preempted by FIFRA, the Court in *Fitzgerald* considered and rejected an earlier contrary holding in *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). Instead, the court relied on the recent holding in *Palmer v. Liggett Group. Inc.*, 825 F.2d 620 (1st Cir. 1987), *cert. denied*, 1989 U.S. LEXIS 338, where the First Circuit reasoned that a finding that a label is inadequate under a state tort theory,

> effectively compels the manufacturer to alter its warning to conform to different state law requirements as "promulgated" by a jury's findings . . . . This challenge to the federal warning label's sufficiency—surely contravenes the Act's policy of uniform labeling . . . . Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies.

Fitzgerald, 681 F. Supp. at 407, (*quoting Palmer v. Liggett Group. Inc.*, 825 F-2d at 627-28). *See also Cipollone v. Liggett Group. Inc.*, 789 F.2d 181 (3rd Cir. 1986) (finding the Federal Cigarette Labeling and Advertising Act preempts state tort claims based on alleged inadequacy of warnings).

The reasoning of *Fitzgerald* applies in this action. To permit additional labeling requirements to be imposed under state common law "would effectively authorize the state to do through the back door" that which was expressly preempted through the front. *Fitzgerald*, 681 F. Supp. at 407.

Plaintiffs' argument against preemption is primarily based upon *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.

1984), which held that FIFRA does not preempt state tort actions based on the inadequacy of an EPA-approved label. Central to the decision in *Ferebee* was the determination that a state court jury verdict does not automatically "require" a manufacturer to change its labels, but rather leaves to the manufacturer the "choice of how to react" to such jury verdict. *Id.* at 1542. ("Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.")

This Court must reject any argument holding that a state court jury verdict would merely leave to the manufacturer the "choice of how to react" to such jury verdict and would not automatically "require" a manufacturer to change its labels. As the First Circuit noted in *Palmer*:

> **This "choice of reaction" seems akin to the free choice of coming up for air after being underwater.** Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. **The most obvious change it can take, of course, is to change its label.**

Palmer v. Liggett Group, 825 F.2d at 627-28 (emphasis added).

This "choice of reaction" analysis was expressly considered and rejected in *Fitzgerald v. Mallinckrodt. Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987), in which it was held that FIFRA preempts state tort actions based on the inadequacy of an EPA-approved label. Most recently, the "choice of reaction" analysis has been rejected by the United States Supreme Court in *International Paper Company v. Ouellette*, 479 U.S. 481 (1987).

Ouellette involved an action against a paper mill located in New York State that discharged effluent into Lake Champlain pursuant to a discharge permit issued under the Clean Water Act, 33 U.S.C. § 1251, *et. seq.* Plaintiffs, residents of Vermont, filed suit against the paper mill alleging that the discharge constituted a common-law nuisance under Vermont law. A preemption argument was raised based upon the Clean Water Act's prohibition of state regulation

of an out-of-state "source" of discharged effluent. The Supreme Court held that the Clean Water Act preempted the common-law nuisance action. In doing so, the Court noted:

> The affected state's nuisance laws would subject [International Paper] to the threat of legal and equitable penalties . . . . Such **penalties would compel the source** to adopt different control standards and a different compliance schedule from those approved by the EPA . . . .

Ouellette, 479 U.S.at 495 (emphasis added). Additionally, the Court held that:

> If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, **at a minimum** [International Paper] **would have to change** its methods of doing business and controlling pollution to avoid the threat of ongoing liability . . . . The inevitable result of such suits would be that Vermont and other states could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.

Id. (emphasis added).

Although the Eleventh Circuit Court of Appeals has not specifically considered whether or not FIFRA preempts state common law torts that impose requirements for insecticide labels, the court has in a recent case affirmed the principle that a State regulates by creating common law tort claims just as it does by creating other forms of preventive relief. See Taylor v. General Motors Corp., No. 87-5879 (11th Cir. June 14, 1989). The court held that the National Traffic and Motor Vehicle Safety Act impliedly preempted state tort law. The court came to this conclusion even in the face of a "savings clause" which stated that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* at 2978 (quoting 15 U.S.C. § 1397(c).

The preemption of state tort law by FIFRA is even stronger than the preemption found in Taylor. In this case, Congress has expressly preempted state law. Furthermore, Congress has not provided a savings clause that would revive any common law remedies that regulate insecticide labels.

The Court finds, therefore, that a state court jury verdict would have the effect of "regulating" the content of a warning label. Since FIFRA expressly preempts state law regulation of pesticide labeling, plaintiffs' state law claims fail to the extent that they are based on defendant's failure to warn.

5. Approval Of Defendant's Labels By The EPA

Plaintiffs argue that the defendant has not established that the EPA approved its labels and that absent such approval, the preemption defense is not established. Plaintiffs specifically object to the defendant's introduction of the affidavits of individuals who do not have personal knowledge of whether or not the EPA approved defendant's labels.

The Court disagrees with plaintiffs' implicit assumption that the preemption defense requires a showing that the EPA actually approved defendant's labels. At most, such a showing would establish that the defendant violated federal regulations concerning labeling. Such a showing would not negate the fact that Congress has expressly preempted state regulation of labeling through a specific expression to that effect by statute. The Court finds that various affidavits submitted by the defendant to show that the EPA approved its labels are irrelevant to this proceeding and have no bearing on this Court's finding of preemption.

6. Necessary And Available Information

The Court disagrees with plaintiffs' argument that preemption requires defendant to show that they have provided to the regulatory agency all the necessary and available information on which to base a warning. A showing that the EPA approved defendant's labels based on inadequate information would not negate a finding that under the law of preemption, the EPA has the exclusive right to regulate those labels. A showing that the EPA based its decision on inadequate information would be appropriate if, for example, the agency approval of defendant's labels were offered for its collateral estoppel effect. This Court's finding of preemption is not based on collateral estoppel or on the agency's approval of the defendant's labels.

The Court's finding of preemption in this case is based on the fact that Congress expressly preempted state law. If Congress has taken away the ability of the states to regulate labels and assigned the regulation of labels to a federal agency, Congress has determined that such an assignment promotes the general welfare. Whether that federal regulatory agency carries out its function based on all available and necessary information is, therefore, irrelevant to a preemption inquiry. This Court cannot second guess the wisdom of that decision. A cause of action based on insufficient labeling would subvert the regulatory scheme for pesticide labeling. Such a cause of action would permit states to regulate labels in the guise of an action for damages and violate Congress's expressed mandate that state's should not regulate labels.

C. Plaintiffs' Remaining Claims: Defectiveness And Unreasonable Dangerousness Under Non-Warning Theories

In Florida the elements of a cause of action for strict liability in tort are 1) the manufacturer's relationship to the product in question, 2) the defective and unreasonably dangerous condition of the product, and 3) the existence of the proximate causal connection between such condition and the user's injuries or damages. *West v. Caterpillar Tractor Company. Inc.*, 336 So. 2d 80, 87 (Fla. 1976). The elements of a cause of action in a negligence products liability case are 1) the existence of a duty on the part of the defendant to protect the plaintiff from injury or damage of which plaintiff complains, 2) the failure of the defendant to perform that duty, and 3) injury or damage to plaintiff proximately caused by such failure. *Blackton Building Supply Co. v. Garesche*, 383 So. 2d 250, 251 (Fla. 5th DCA 1980). In practice, the causes of action for strict liability in tort and negligence are similar, and both require proof that the defendant's product was defective and unreasonably dangerous. *See Witt v. Norfe. Inc.*, 725 F.2d 1277-79 (11th Cir. 1984).

Florida law recognizes that the defective and unreasonably dangerous condition of a product can be established by showing that a product contained a manufacturing flaw, *see Matter of Standard Jury Instr. (Civil Cases)*, 435 So. 2d 782, 782-83 n.* (*citing* Restatement (Second) of Torts, § 402A, comment k, (1965)), or by showing that a product contained a design defect. *Id.* It appears that Florida

courts have not spoken definitively as to whether or not a manufacturer's failure to warn can constitute a ground for finding a product defective and unreasonably dangerous. *See id.*, 435 So. 2d at 783 n.*.

This Court assumes without deciding that Florida law would recognize that a manufacturer's failure to warn could at least under certain conditions render a product defective and unreasonably dangerous. Although this Court is aware that other jurisdictions have found that a manufacturer's failure to warn can constitute an independent ground for finding a product to be defective and unreasonably dangerous, *see 2 American Law of Products Liability 3d*, Part 5, Chapter 17, § 17:3, n.9 (T.E. Travers ed. 1987), this Court's ruling should not be interpreted as any extension of Florida law on this issue. In light of the Court's conclusion that any cause of action based on the defendant's failure to warn is preempted, the existence of the cause of action in the first instance is immaterial to the Court's decision.

The Court finds that plaintiffs' theory for finding the products defective and unreasonably dangerous is not based exclusively on defendant's failure to warn, but on a theory that products containing Paramite have design defects and/or manufacturing flaws. To the extent that plaintiffs' claims are based on the defective and unreasonably dangerous condition of defendant's products due to defendant's failure to warn, plaintiffs' claims are preempted as a matter of law. To the extent that plaintiffs' claims are otherwise based on the defectiveness or unreasonable dangerousness of defendant's product on theories of defective design or manufacturing flaw, the plaintiffs' claims remain viable.

This Court stresses that this opinion does not address any issue not raised and briefed by the parties. In particular, the parties have not addressed the question whether or not the defendant can assert its warnings as a defense to plaintiffs' remaining claims, or whether or not the assertion of a defense of warning is preempted by FIFRA.

II. Interlocutory Appeal

The Court finds that this order and partial judgment, although interlocutory in character, involves a controlling question of law as to which there is substantial ground for difference of opinion and

upon which an immediate appeal from the order may materially advance the ultimate termination of the litigation. In particular, the Court finds that whether or not FIFRA expressly preempts state products liability law is such a question. The Court so certifies pursuant to 28 U.S.C. § 1292(b).

The Court reminds the parties that either or both of them have ten (10) days from the date of this order in which to file an application under 28 U.S.C. S 1292(b) for the Court of Appeals to review this order and partial judgment. If either of the parties file such an application with the court of appeals, this Court shall stay all proceedings in this case pending the disposition of the § 1292 application by court of appeals and any interlocutory appeal which that court may entertain.

III. **Plaintiffs' Remaining Motions**

As to Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989, the Court finds that the Amended Complaint attached to the motion contains claims based on defendant's failure to warn. The Court also notes that the ultimate contents of the complaint may be affected by a possible interlocutory appeal.

The Court will, therefore, deny the motion to file the amended complaint attached to the motion. The Court will, however, give plaintiffs leave to file an amended complaint subsequent to the court of appeals' decision on any application for interlocutory appeal and subsequent to any interlocutory appeal that the court of appeals may thereupon entertain.

Accordingly, it is

ORDERED and ADJUDGED:

1. That Defendant Zoecon Corporation's Motion For Partial Summary Final Judgment, filed April 10, 1989, is granted.
2. That judgment is hereby entered for defendant Zoecon and against the plaintiffs to the extent plaintiffs' claims are based on the defendant Zoecon's failure to warn.
3. That Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989, is denied.

4. That plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989, is denied.

5. That this Court hereby certifies that this order and partial judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal under 28 U.S.C. § 1292(b) would materially advance the ultimate termination of the litigation.

6. That either or both parties may within ten (10) days from the date of this order file an application under 28 U.S.C. § 1292(b) with the court of appeals to review this order and partial judgment.

7. That if either plaintiff or defendant Zoecon should file a §1292(b) application with the court of appeals, all proceedings in this case shall thereupon be stayed pending the disposition of the § 1292 application and any interlocutory appeal which the court of appeals may thereupon entertain.

8. That if the court of appeals accepts jurisdiction over the interlocutory appeal, the pretrial conference set for December 19, 1989, shall automatically be cancelled until further order of the Court, and the parties shall automatically be relieved from being required to file a pretrial stipulation until further order of the Court.

DONE AND ORDERED at Jacksonville, Florida, this 2nd day of Aug., 1989.

/S/ SUSAN H. BLACK

UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Garry Randolph, Courtroom Deputy Clerk

Supreme Court, U.S.
FILED
JUN 28 1991
OFFICE OF THE CLERK

No. 90-1837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988), which vests the United States Environmental Protection Agency ("EPA") with comprehensive and exclusive authority to regulate the content of pesticide labeling, which defines labeling broadly and requires pesticide manufacturers to distribute their products only with EPA-approved labeling, which requires EPA to ensure that labeling contains warnings adequate to protect health and the environment, and which explicitly prohibits "any" state requirements for labeling "in addition to or different from" those imposed by EPA, preempts state law tort claims alleging that a pesticide manufacturer distributed its product with inadequate labeling or warnings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1837

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

The petition presents a federal preemption question arising entirely under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988). Respondent Zoecon Corporation [1] opposes certiorari because (i) there is no widespread split of appellate authority on the question of whether FIFRA preempts state law tort claims for inadequate pesticide labeling or warnings; (ii) the opinion of the U.S. Court of Appeals for the Eleventh Circuit correctly applies the principles of implied preemption and should conclusively resolve the question for federal and state trial courts; and (iii) the court's opinion, which affirms an interlocutory order granting Zoecon's motion for partial summary judgment with respect to petitioners' failure to

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[1] Zoecon has no subsidiaries which are not wholly owned. Its parent is Sandoz Corporation, a subsidiary of Sandoz Ltd.

warn claims, leaves petitioners free to pursue their other causes of action in the district court proceedings below.

COUNTER-STATEMENT OF THE CASE

A. EPA's Exclusive Control of Pesticide Label Warnings

FIFRA vests the United States Environmental Protection Agency ("EPA") with comprehensive and exclusive authority to regulate the content of a pesticide's labeling, including determining what product warnings pesticide manufacturers such as Zoecon should provide to pesticide applicators (i.e., users) such as petitioner Minas Papas.[2] EPA has the necessary scientific data, technical resources, expertise, experience, objectivity, and national perspective to determine which warnings and precautionary measures are warranted, and which are not, for each pesticide product.[3]

Section 24(b) of FIFRA broadly and explicitly prohibits "any" state law requirements for labeling "in ad-

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[2] FIFRA's definition of "labeling" encompasses "all labels and all other written, printed, or graphic matter . . . (A) accompanying the pesticide . . . at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide." 7 U.S.C. § 136(p)(2). The terms label and labeling are used interchangeably in this brief.

[3] EPA may register a pesticide only if it first determines that the product, when used in accordance with its labeling, will not cause "unreasonable adverse effects" to man or the environment. 7 U.S.C. §§ 136a(c)(5), 136(bb). In addition, EPA must determine that a pesticide's labeling complies with the other requirements of FIFRA, including that the product is not "misbranded." *See* 7 U.S.C. § 136(q); 40 C.F.R. § 152.112(f) (1990) (approval of registration). A pesticide is misbranded if, *inter alia*, "the label does not contain *a warning or caution statement* which may be necessary and if complied with . . . is adequate to protect health and the environment." 7 U.S.C. § 136(q)(1)(G) (emphasis added). A pesticide also is misbranded if "the labeling accompanying it does not contain *directions for use which . . . are adequate to protect health* and the environment." 7 U.S.C. § 136(q)(1)(F) (emphasis added).

dition to or different from" those imposed by EPA pursuant to FIFRA. 7 U.S.C. § 136v(b). Congress intended this provision "to completely preempt State authority in regard to labeling." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971); *see also* S. Rep. No. 838, 92d Cong., 2d Sess. 30, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4021. The Supreme Court's recent decision in *Wisconsin Public Intervenor v. Mortier*, 59 U.S.L.W. 4755 (U.S. June 21, 1991), which involved an entirely different FIFRA preemption issue (i.e., whether § 24(a) of FIFRA, 7 U.S.C. § 136v(a), preempts local governments from regulating pesticide use), makes it clear that labeling "fall[s] within an area that FIFRA's 'program' pre-empts." *Id.* at 4760. Indeed, as the Court observed, "FIFRA's historic focus [is] on labeling." *Id.* at 4759 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)).

By preempting state requirements for pesticide labeling, Congress has sought to achieve its objective of protecting health and the environment through nationally uniform labeling that is regulated solely by EPA. Congress reaffirmed this goal in 1988 by adding the heading "Uniformity" to FIFRA § 24(b). *See* Pub. L. No. 100-532, sec. 801(m)(2), 102 Stat. 2654, 2682 (1988).

Uniformity in labeling is critically important to fulfilling FIFRA's fundamental purpose, which is "to protect man and his environment." S. Rep. No. 838, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. Uniformity promotes applicator and public safety by enhancing user comprehension and avoiding confusion over conflicting or inconsistent label warnings and precautions. To achieve uniformity, EPA not only ensures that a particular manufacturer's pesticide product is labeled identically throughout the United States, but also that different manufacturers' brands of the same pesticide, alternative pesticides for the same uses, and pesticides posing similar risks, include label

warnings and precautionary measures which are identical or as consistent as possible.

The well-reasoned court of appeals decision which petitioners are asking this Court to review gives full force and effect to congressional intent. It recognizes that allowing juries to regulate pesticide labeling by means of state law damage awards "would destroy the uniformity that Congress and the EPA seeks to achieve in pesticide labeling," and thereby "disrupt the methods by which FIFRA protects man and the environment." *Papas v. Upjohn Co.*, 926 F.2d 1019, 1025, 1026 (11th Cir. 1991).

B. The Decision Below

Petitioner Minas Papas and his wife have filed a district court action for damages, alleging that his unfortunate health problems were caused in part by his occupational use of Paramite, an EPA-registered and labeled pesticide product manufactured and distributed by Zoecon. Their state law tort claims include—but are not limited to—theories that the EPA-regulated labeling accompanying Zoecon's product failed to provide adequate warnings. *See* Petition for a Writ of Certiorari ("Pet.") at 6 ("Common to each count, in addition to other asserted bases for relief, was the charge that the labels failed to adequately warn of [Paramite's] dangers and of steps that should be taken to avoid them"). The district court granted Zoecon's motion for partial summary judgment on the labeling claims, making it clear that its order did not extend to petitioners' non-warning related causes of action against Zoecon (i.e., manufacturing flaw, design defect). *See id.* Appendix ("Pet. App.") at 23-24.

In affirming the district court's order, the court of appeals held that "FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides *to the extent that* such actions are based on claims of inadequate labeling." *Papas*, 926 F.2d

at 1026 (emphasis in original).[4] The court reviewed the "powerful limit on state power over labeling" embodied in FIFRA § 24(b), and found that "[u]nder FIFRA, the federal government—through the EPA—has the sole and exclusive right to regulate pesticide labels." *Id.* at 1023, 1024.

In addition to considering FIFRA § 24(b)'s express prohibition against state labeling requirements, the court examined the comprehensive manner in which EPA has regulated pesticide labeling, especially warnings, where the "desire for uniformity is particularly evident." *Id.* at 1024-25, 1025 n.6. On this basis, the court held "that the federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions." *Id.* at 1025; *accord Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283, 1287 (W.D. Mo. 1989). In *Wisconsin Public Intervenor*, the Supreme Court indicated that while FIFRA does not occupy the field of pesticide regulation in general (or local use permitting in particular), FIFRA does occupy the field of pesticide labeling regulation. 59 U.S.L.W. at 4759.

As a separate basis for preemption, the court of appeals held that "jury awards of damages in such tort actions [for inadequate labeling] would result in direct conflict with federal law." *Papas*, 926 F.2d at 1025. The court found that "a jury determination . . . that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate." *Id.*[5] As a result, labeling claims such as peti-

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[4] The court indicated that "[g]iven FIFRA's words and its legislative history, FIFRA may expressly preempt state common law actions of the kind before [the court]," but passed over the question of express preemption, concluding that "FIFRA impliedly preempts state common law tort actions based on labeling claims in several ways." *Id.* at 1023-24.

[5] The court found that "[s]uch a jury determination is also in direct conflict with the Congressional intent that *the EPA Ad-*

tioners' directly conflict with FIFRA § 24(b) and EPA's exclusive supervision of labeling.

The court also analyzed the effects of state law damage awards for supposedly inadequate pesticide labeling, and found that "allowing state common law tort suits for inadequate labeling would 'stand as an obstacle to the accomplishment and execution of the full objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This is because the "case-by-case, state-by-state outside pressure on the regulatory process" resulting from "jury-found 'inadequacies' in labeling" would "hinder the development of an orderly, systematic, and uniform nationwide labeling scheme." *Papas*, 926 F.2d at 1026. The court concluded, therefore, that "[a] jury's imposition of damages in a state tort suit premised on labeling claims would disrupt the methods by which FIFRA protects man and the environment." *Id.*[6]

C. Petitioners' Misleading Statement of the Case

In downplaying the purpose and preemptive effect of FIFRA § 24(b), petitioners convey the erroneous impression that EPA plays little if any role in reviewing pesticide risks and regulating pesticide labeling. To the contrary, in implementing its "sole and exclusive right to regulate pesticide label[ing]. . . . EPA has regulated

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ministrator determine the reasonableness of the risks to man and the environment posed by pesticides, at least with respect to the labeling of pesticides." *Id.* (emphasis in original).

[6] The court also rejected petitioners' contention that there should be an exception to preemption where (unlike here) a manufacturer has failed to provide complete information to EPA. *Id.* at 1026 n.8. The court noted that "[g]iven the FIFRA regulatory scheme, it would be up to the EPA—and *not* a jury—to determine first (1) whether the information provided was incomplete or inaccurate; (2) whether the omitted information is significant enough to mandate a change in the label; and (3) how, if at all, the label should be corrected. *Id.* (emphasis in original); *see also Papas* dist. ct. slip op., Pet. App. at 22-23; *infra* at 9-10, 21-23.

almost every aspect of pesticide labeling." *Papas*, 926 F.2d at 1024.[7] To facilitate its labeling determinations, EPA has promulgated elaborate requirements for numerous types of state-of-the-art scientific studies, which it directs pesticide manufacturers to conduct in accordance with stringent protocols and submit within firm deadlines. *See* 7 U.S.C. § 136a(c)(2)(A), (B); 40 C.F.R. pt. 158 (1990) (listing dozens of required toxicology and other studies). EPA's Office of Pesticide Programs, which employs hundreds of scientists and has an annual budget of almost $100 million, exhaustively reviews these studies and data, and based on its review, determines precisely what warnings should accompany each pesticide product; specifies the exact wording and format to be utilized; and directs the pesticide manufacturer to comply. The manufacturer's duty is to distribute its pesticide product with the EPA-specified labeling. *See* 7 U.S.C. §§ 136a(a), 136a(c)(5)(B). To underscore this point, FIFRA makes it unlawful to add to or alter the EPA-approved labeling in any way. 7 U.S.C. § 136j(a)(2)(A).[8]

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[7] As the court of appeals noted, EPA has promulgated detailed regulations specifying the scope, content, wording, and format of pesticide labeling. *See* 40 C.F.R. pt. 156 (1990). A pesticide product cannot be registered under FIFRA unless its labeling complies with these regulations, and also with EPA's additional requirements, which encompass whatever specific warnings or precautionary statements the Agency determines are necessary to protect health and the environment in connection with use of the product. *See* 40 C.F.R. § 152.112(f). Because the ingredients, toxicity, and use patterns of each pesticide differ, EPA makes labeling determinations on a product-by-product basis. *See* 49 Fed. Reg. 37,960, 37,965 (1984) ("Because it is impossible to prescribe . . . exact statements for all combinations of ingredients, formulation types, and uses . . . . [t]he need for additional precautionary statements or modified ones [will] be determined on a case-by-case basis").

[8] Petitioners erroneously imply that EPA's review of a pesticide and its labeling is a one-time event. Pet. at 5 n.3. To the contrary, even after EPA approves the registration of a pesticide, it will instruct the registrant (i.e., manufacturer) to amend the pesticide's labeling to incorporate additional EPA-specified warnings, precau-

Petitioners' statement of the case also omits the undisputed material fact that Zoecon, as required by FIFRA, at all times distributed its Paramite pesticide product with the EPA-approved and required labeling. Furthermore, petitioners' statement is patently incorrect with respect to the regulatory status of Paramite, which is an EPA-registered pesticide (EPA Reg. No. 2724-169) labeled for external control of fleas, ticks, and scabies mites on dogs' skin. Since its introduction in 1978, Paramite and its labeling have been regulated solely by EPA pursuant to FIFRA.

Contrary to petitioners' assertions (Pet. at 4, 5 n.3), Paramite is not now, and never has been, registered with the Food and Drug Administration, or deemed to be a "new animal drug" under the Federal Food, Drug, and Cosmetic Act ("FFDCA"). Petitioners' erroneous assertion that Paramite is regulated under FFDCA as well as FIFRA is rebutted by FIFRA's definition of "pesticide," which expressly excludes from the purview of FIFRA any "new animal drug" regulated under FFDCA. *See* 7 U.S.C. § 136(u); *see also* 21 U.S.C. § 321(q) (1988) (FFDCA definition of "pesticide chemical" incorporating FIFRA definition of "pesticide").[9]

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tionary statements, or other information when and if the Agency determines they are necessary. *See* 40 C.F.R. § 152.148(a). Furthermore, as part of the congressionally mandated FIFRA reregistration process, EPA reviews updated data needed to reassess whether a pesticide and its labeling continue to meet the statutory requirements for registration. *See* 7 U.S.C. § 136a-1; 40 C.F.R. § 152.144 ("the Agency may require a registrant to change a product's . . . labeling . . . to be reregistered and to maintain his registration in compliance with FIFRA"). Phosmet, the active ingredient in Paramite, along with most other pesticide active ingredients, is currently undergoing an exhaustive EPA reregistration review.

[9] Petitioners apparently are confusing Paramite, which has always been regulated exclusively as a pesticide pursuant to FIFRA, with GX-118, a Zoecon animal drug which contains the same active ingredient as Paramite, but has an entirely different purpose (treatment of internal grubs in beef cattle), method of application (spinal pour-on), and mode of action (internal/systemic).

Petitioners also erroneously assert that Paramite is "extremely similar" to, and performs "essentially the same function" as, Mitaban, the FFDCA-regulated animal drug distributed by Upjohn Co. which they allege was another cause of Mr. Papas' health problems. Pet. at 3, 27. Mitaban contains a different active ingredient than Paramite; its purpose is different (control of internal *Demodex canis* mites in dogs); and its mode of action is different (internal/systemic, not external).[10]

To compound their errors, petitioners grossly distort the facts regarding the toxicologically insignificant amount of benzene present as an *impurity* in one of Paramite's EPA-approved inert ingredients, Sure Sol 190, a solvent which was supplied to Zoecon by Koch Industries.[11] Benzene is of toxicological concern to EPA, and requires identification on a pesticide's label, *only* when it is deliberately added to a pesticide product as an inert ingredient, not where, as here, it is merely as an impurity associated with an inert. *See* 52 Fed. Reg. 13,305-307 (1987) (EPA policy statement on inerts which specifically addresses benzene and expressly excludes impurities). Petitioners' own toxicology expert confirmed in testimony at a preliminary hearing that the benzene in Paramite is not an inert ingredient, but merely an impurity (a side reaction product) created during manufacture of Sure Sol 190. Hearing Transcript at 12-13, *Papas v. Upjohn Co.*, No. 88-116-Civ-J-14 (M.D. Fla. Jan. 11, 1989) (Testimony of William L. Marcus). Nevertheless, petitioners repeatedly ignore or confuse this important distinction and refer to the minute

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[10] The district court's order does not address petitioners' claims against Upjohn Co., which is also a defendant in their suit.

[11] EPA's regulations define "inert ingredient" as "any substance . . . other than an active ingredient, which is *intentionally* included in the pesticide product." 40 C.F.R. § 158.153(f) (1990) (emphasis added). An "impurity" is "any substance . . . in a pesticide product *other than* an active ingredient or an inert ingredient, including . . . side reaction products [and] contaminants." *Id.* § 158.153(d) (emphasis added).

amount of benzene impurity in Paramite as if it were an (intentionally added) inert ingredient. *See, e.g.*, Pet. at 23-24 (referring to EPA's supposed "inability to adequately deal with inert ingredients (the culprit in the instant case)").

Petitioners' assertion that EPA lacked adequate information about Paramite because it was unaware of the benzene in Sure Sol 190 is incorrect. As a result of petitioners' allegations, Zoecon determined that the amount of benzene impurity present is less than 0.01% by weight (not 0.1% as petitioners assert). Zoecon *did* notify EPA, which confirmed that benzene impurities are frequently and unavoidably present in EPA-approved aromatic petroleum-based inert ingredients such as Sure Sol 190, and that such impurities do not warrant label warnings. For this reason, EPA does not require pesticide registrants to identify or submit data on impurities which are associated with (i.e., present in) inert ingredients, such as the innocuous benzene impurity associated with Koch's Sure Sol 190. *See* 40 C.F.R. § 158.155(e) (1990). Nor has EPA changed Paramite's labeling or taken any other regulatory action as a result of the benzene impurity in Sure Sol 190. Thus, there is no factual basis for petitioners' arguments regarding EPA's supposedly "inadequate" information.

Finally, it should be noted that petitioners' factual assertions regarding the nature, extent, and cause of Mr. Papas' health problems are all unproven allegations which, for the most part, are not even supported by the discovery that has been conducted at this early stage of the district court proceedings. Nor is petitioners' description of the proceedings below complete: Petitioners fail to inform the Court that they have initiated a separate district court action for damages against Koch, the supplier of the Sure Sol 190 inert ingredient which they allege caused Mr. Papas' health problems. *Papas v. Koch Refining Co.*, No. 90-790-Civ-J-16 (M.D. Fla. filed Sept. 6,

1990). That action, like petitioners' suit against Zoecon and Upjohn Co., asserts non-warning related causes of action as well as failure to warn theories. Thus, there is no basis for petitioners' assertions that the interlocutory decision of the court of appeals leaves them without a remedy.[12]

SUMMARY OF ARGUMENT

Although FIFRA § 24(b) was enacted almost twenty years ago, *Papas v. Upjohn Co.* is only the second federal appellate decision on FIFRA preemption of state law tort claims for inadequate labeling. The [illegible] decision, the District of Columbia Circuit's 1984 anti-preemption ruling in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), has been criticized with increasing frequency by federal and state trial courts. Furthermore, *Ferebee*'s flawed reasoning has been rejected in intervening Supreme Court cases such as *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). *Papas* will help to avert a future split of authority among trial courts by adding substantial weight and momentum to the judicial trend toward FIFRA preemption of jury-imposed requirements for pesticide labeling.

In holding that FIFRA impliedly preempts state law tort claims based on theories of inadequate labeling, the court of appeals in *Papas* adhered to traditional preemption principles and analysis. The court overcame any applicable presumptions against preemption by finding a clear and manifest congressional intent to preempt all state requirements for labeling.

Contrary to petitioners' assertions, the court of appeals did not err by rejecting their proposed exceptions to pre-

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[12] Zoecon's acquiescence to petitioners' application for an interlocutory appeal from the district court's order granting partial summary judgment obviously does not imply that the decision of the court of appeals warrants exercise of this Court's discretion to grant a writ of certiorari.

emption. Because petitioners are challenging the adequacy of labeling that EPA determined was adequate, their labeling-related claims fall squarely within FIFRA's regulatory scope and preemptive field. The court found that those claims would directly conflict with EPA's administration of FIFRA and its achievement of congressional objectives, rather than exert merely "indirect" regulatory pressure. Furthermore, based on EPA's comprehensive authority to regulate labeling, including its authority to specify and require pesticide manufacturers to submit data needed for determining appropriate warnings, the court correctly rejected petitioners' theory that preemption does not apply where EPA has "inadequate" data. Moreover, petitioners' arguments regarding inadequate data are hypothetical since there is no factual basis in this case for their contentions that EPA lacked data or information needed to regulate the labeling of Zoecon's Paramite pesticide product.

Petitioners' analogy to FFDCA is inapt because Paramite is not and never has been subject to regulation under that statute, and the Upjohn Co. animal drug which petitioners allege also caused Mr. Papas' health problems has a different purpose, mode of action, and active ingredient. In addition, petitioners have cited case law only under the drug provisions of FFDCA, which do not expressly prohibit state regulation of labeling as does FIFRA § 24(b). Petitioners fail to discuss the medical device provisions of FFDCA, 21 U.S.C. § 360k(a), which contain language virtually identical to FIFRA § 24(b), and under which there is a substantial body of case law holding that state law tort claims for inadequate labeling or warnings are preempted.

The court's decision does not leave petitioners without a remedy, since neither the district court nor the court of appeals held that petitioners' non-warning related claims are preempted. Further, the court's ruling does not affect petitioners' claims against Upjohn Co. or Koch Industries for the same alleged injuries.

Finally, there is no reason to hold the petition in abeyance pending the Court's decision in a preemption case involving the Federal Cigarette Labeling and Advertising Act, a statute which petitioners concede is significantly different from FIFRA. Preemption of state law tort claims for inadequate pesticide labeling does not depend on whether cigarette warning claims are preempted.

REASONS FOR DENYING THE WRIT

I. THERE IS NO WIDESPREAD SPLIT OF APPELLATE AUTHORITY

FIFRA preemption of state law tort claims for inadequate labeling has never ripened into a widespread controversy among appellate courts. During the two decades since enactment of FIFRA § 24(b), only two federal courts of appeals have ruled on the question: the D.C. Circuit in *Ferebee v. Chevron Chemical Co.*, and the Eleventh Circuit in the instant case.[13] No state courts of last resort have addressed the subject.

As petitioners acknowledge, the real split of authority has been among trial courts. That split was engendered by the flawed reasoning of the 1984 *Ferebee* decision, which numerous lower federal and state courts had squarely rejected well before the Eleventh Circuit's opinion in *Papas*.[14] A split of authority among lower courts

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[13] The Tenth Circuit is considering FIFRA preemption of labeling claims in *Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, No. 91-1085 (10th Cir. appeal accepted Feb. 26, 1991). The appellee in that case has raised an issue as to whether the post-1972 (and current) version of FIFRA is applicable.

[14] *See, e.g., Hurt v. Dow Chemical Co.*, No. 90-0783-C(3) (E.D. Mo. Sept. 28, 1990); *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989); *Herr v. Carolina Log Buildings, Inc.*, No. EV 85-262-C (S.D. Ind. Sept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D. Md. Nov. 8, 1988); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987); *Bolduc v.*

normally is not sufficient reason for the Supreme Court to exercise its discretion to grant certiorari. *See* S. Ct. R. 10.

Rather than create confusion or unpredictability, which petitioners assert already existed in the wake of *Ferebee*, the *Papas* decision adds substantial weight and momentum to the judicial trend among trial courts toward FIFRA preemption of state law tort claims for inadequate labeling. *Papas* thereby will help diminish any further uncertainty as to whether pesticide manufacturers can be held liable under state tort law for distributing their products with labeling that EPA has determined is adequate and requires them to utilize. Indeed, the impact of *Papas* already has been felt: Trial courts around the country have begun to adopt its conclusions and reasoning.[15]

The Supreme Court's intervening decisions also have reduced *Ferebee*'s credibility. For example, *Ferebee* is

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Chemed Corp., No. 43-94-55 (Cal. Super. Ct. Orange Cty. Apr. 10, 1989), *aff'd on other grounds*, No. G008338 (Cal. Ct. App. Sept. 24, 1990); *Lopez v. Chevron Chemical Co.*, No. 89272 (Cal. Super. Ct. Ventura Cty. Oct. 25, 1988); *Oppermann v. Stevens*, No. 88CV1192 (Colo. Dist. Ct. Boulder Cty. June 1, 1990); *Begley v. Truly Nolen Exterminating, Inc.*, No. 90-870 (Fla. Dist. Ct. App. 3d Dist. Feb. 5, 1991).

[15] *See, e.g., Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 13, 1991) ("The Court is persuaded by the reasoning of the Eleventh Circuit in *Papas v. Upjohn Co.* . . . and elects to follow that decision"); *Southern Colorado Farms, Inc. v. Green*, No. 88 CV 40, slip op. at 4 (Colo. Dist. Ct. Saguache Cty. June 7, 1991) ("The Court finds persuasive and hereby adopts the reasoning and holding of the U.S. Court of Appeals for the Eleventh Circuit in *Papas v. Upjohn Co.*"); *Brennan v. Dow Chemical Co.*, No. CL-90-8882 AO (Fla. Cir. Ct. Palm Beach Cty. June 3, 1991); *Abelman v. Velsicol Chemical Corp.*, Civ. No. 12611, slip op. at 26 (Md. Cir. Ct. Montgomery Cty. May 17, 1991) ("This Court finds the reasoning of the *Papas* Court persuasive for the reasons stated therein"); *Davidson v. Velsicol Chemical Corp.*, No. A-246535 (Nev. Dist. Ct. Clark Cty. Apr. 5, 1991).

premised on the erroneous notion that because a damage award for inadequate labeling is not "a direct regulatory command" to change the label, a pesticide manufacturer may prefer to choose leaving the label the way it is, while "simultaneously paying damages to successful tort plaintiffs" in future suits. *Ferebee*, 736 F.2d at 1541; *see* Pet. at 22-23. In *International Paper Co. v. Ouellette*, 479 U.S. at 495, however, which petitioners fail to cite, this Court confirmed that such a "choice of reaction" is illusory.

The Court held in *International Paper Co. v. Ouellette* that the Clean Water Act, a federal environmental protection statute, preempted certain state law tort suits against manufacturers which comply with EPA's regulatory requirements because "the threat of legal . . . penalties . . . would compel the [manufacturer] to adopt different . . . standards . . . from those approved by the EPA." The Court explained that "[t]he inevitable result of such suits would be that . . . States could do indirectly what they could not do directly—regulate." *Id.* "It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Id.* at 497. *Ferebee* failed to take into account such interference "with the methods by which the federal statute was designed to reach [its] goal." *Id.* at 494; *see Papas*, 926 F.2d at 1021-22, 1025-26.

More recently, in the labor law context, the Court has recognized that state law tort suits are preempted where they "would subject [federally regulated companies] to burdens not unlike those that Congress sought to foreclose," particularly where "courts, exercising their common law powers, might develop different substantive standards applicable to the same . . . conduct, requiring the tailoring of . . . conduct to the peculiarities of the law of each jurisdiction." *Ingersoll-Rand Co. v. McClen-*

don, 111 S. Ct. 478, 484 (1990) (ERISA preempted employee's state law wrongful discharge claim). "Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement." *Id.*; *see also International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1209 (1911) (quoting *Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 531 (1959)) (dicta in employee sex discrimination suit that allowing state law tort liability for complying with federal requirements "would sanction the unconscionable result of permitting civil . . . liability to be imposed for the very conduct the [federal] statute demands of the licensee").[16] Again, the *Ferebee* decision ignored such considerations by failing to recognize the deleterious effects that damage awards from tort claims for inadequate labeling would have on EPA's accomplishment and execution of congressional objectives, especially Congress' goal of uniform national labeling that is regulated exclusively by EPA pursuant to FIFRA's standards.

Thus, while *Papas* technically created a split of authority between two federal circuits, it is a lopsided split that will become even less viable as additional courts have the opportunity to consider and adopt *Papas* after comparing it with *Ferebee*.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE PRINCIPLES OF IMPLIED PREEMPTION

None of petitioners' contentions that the *Papas* opinion conflicts with the analytical framework for preemption analysis or deviates from preemption principles has merit or is a basis for granting a writ of certiorari in this case.

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[16] It is well established that a state cannot impose common law damages upon corporations for doing what a federal act or regulation "authorized them to do." *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *see also Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982).

A. The Court Adhered to Standard Preemption Analysis and Principles

The court's opinion presents a traditional preemption analysis that follows well-established principles. It begins by summarizing the various ways that federal law can preempt state law, and explains that "[t]he principle of implied preemption 'applies . . . whether the state law is rooted in a statute, regulation, or common law rule.'" 926 F.2d at 1021-22 (quoting *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989) (citations omitted), *cert. denied*, 110 S. Ct. 1781 (1990)). The court emphasizes that "[a] state law—even if it has the same ultimate goal as a federal law—may stand as an obstacle to the full implementation of a federal law and therefore be preempted 'if it interferes with the methods by which the federal statute was designed to reach this goal.'" 926 F.2d at 1021-22 (quoting *International Paper Co. v. Ouellette*, 479 U.S. at 494).

Further, the court explained that "[t]he critical question in considering whether state law is preempted by federal law is Congressional intent—that is, 'whether Congress intended that federal regulation supersede state law.'" 926 F.2d at 1022 (quoting *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986)). "'[I]n implied preemption analysis it is possible to infer preemptive intent solely from effects': even if statutory language or legislative history is unclear, federal law pr mpts state law if 'the ordinary application of the two creates a conflict.'" 926 F.2d at 1022 (quoting *Taylor*, 875 F.2d at 826).

The court then discusses FIFRA's statutory scheme, emphasizing that in § 24, 7 U.S.C. § 136v, "Congress delineated the extent to which the states could regulate pesticides," allowing states "to impose stricter regulation on pesticide *use*," but "completely preempt[ing] State authority in regard to labeling." *Id.* at 1023 (quoting S. Rep. No. 92-838 at 30, *reprinted in* 1972 U.S. Code

Cong. & Admin. News at 4021 (emphasis in original); H.R. Rep. No. 92-511 at 16); *accord Wisconsin Public Intervenor*, 59 U.S.L.W. at 4759-60; *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989).[17]

The court indicates that given its "words and its legislative history, FIFRA may expressly preempt state common law actions of the kind before us." Nevertheless, the court exercises caution by passing over the question of express preemption, and instead, considers "whether federal preemption of state common law tort claims based on labeling deficiencies can be inferred." *Papas*, 926 F.2d at 1023-24.

The court begins its implied preemption analysis by explaining that under FIFRA, EPA "has the sole and exclusive right" to regulate pesticide labeling, and by describing the comprehensive way that EPA has implemented this authority, especially with respect to warnings. *Id.* at 1024. As discussed above, the court finds that "FIFRA impliedly preempts state common law tort actions based on labeling claims in several ways." *Id.* First, the court holds that pursuant to FIFRA § 24(b), the federal government has occupied the field of pesticide

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[17] Petitioners have misread the *New York State Pesticide Coalition* case, which merely held that FIFRA does not preempt state agencies from promulgating regulations requiring commercial applicators to provide certain public notifications about their pesticide application activities. There is no suggestion in the case that pesticide manufacturers such as Zoecon, which comply with EPA labeling requirements, can or should be subject to additional labeling requirements or notification duties imposed by state law, much less through common law tort actions. Indeed, the Second Circuit explained that FIFRA § 24(b) places labeling within "EPA's *exclusive supervision*"; that "FIFRA 'labeling' is designed to be read and followed by the *end user*" (e.g., petitioner Papas); and that "FIFRA's prohibition of state labeling 'in addition to or different from' that approved by the EPA has as 'its main focus . . . *preserving the force of the information contained in the FIFRA label.*'" 874 F.2d at 118, 119 (emphasis added).

labeling regulation, leaving no room for state common law tort actions based on labeling claims. *Id.* at 1024-25. Second, the court holds that damage awards in such tort actions would directly conflict with federal law by conflicting with EPA's determination pursuant to FIFRA that a pesticide's labeling is adequate, and by interfering with EPA's achievement of labeling uniformity, thereby standing as an obstacle to accomplishment and execution of Congress' objectives. *Id.* at 1025-26. The court concludes that state common law tort claims for inadequate labeling are preempted because they would violate FIFRA and congressional intent by imposing requirements for labeling pesticides. *Id.* at 1026.[18]

B. The Court's Opinion Overcomes Any Applicable Presumptions Against Preemption

Petitioners transform the general presumption against preemption into an absolute bar, and then assert that the court of appeals has disregarded it. Pet. at 18-20. To the contrary, the court's opinion goes to great lengths to show that Congress' clear and manifest purpose was to preempt all state requirements for labeling so that EPA alone could regulate labeling and thereby protect health by achieving national uniformity. The court, therefore, has made all the findings requisite to overcoming any applicable presumptions against preemption. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). By claiming that "uniformity of labeling was not particularly important to Congress," petitioners demonstrate it is they who have "failed to take notice of Congress's overriding intent." Pet. at 22; *see Papas*, 926 F.2d at 1026 (EPA evaluates toxicological data "to achieve the protection of 'man and his environment' through a labeling

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[18] As previously noted, the court also finds that there is no exception where (unlike here) a pesticide manufacturer has failed to provide complete information to EPA. *Id.* at 1026 n.8; *see supra* at 6 n.6.

system that is uniform and consistent across the broad spectrum of pesticides").[19]

C. This Is Not a Case Involving "Indirect" or "Incidental" Regulatory Pressure

Petitioners suggest that their state law tort claims challenging the adequacy of EPA-regulated, approved and mandated labeling would exert only "indirect regulatory pressure," and as a result, should not be preempted. Pet. at 19-21. As the court of appeals recognized, however, there is nothing "indirect" about the way in which petitioners' claims "would disrupt the methods by which FIFRA protects man and the environment." *Papas*, 926 F.2d at 1026. It is well settled that the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Id.* (quoting *Taylor v. General Motors Corp.*, 875 F.2d at 824 n.16); *see also Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 484; *International Paper Co. v. Ouellette*, 479 U.S. at 495; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

The cases cited by petitioners (Pet. at 19, 21) do not help their cause. In two of the cases the Court found that the subject matter of the tort claim, and thus its regulatory effect, was not sufficiently related to the regulatory purpose of the federal statute to fall within its preemptive field. *See English v. General Electric Co.*, 110 S. Ct. 2270, 2278 (1990) (employee's claim for nu-

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[19] Petitioners' assertion that FIFRA "does not preclude manufacturers of identical products from using vastly different labels" is simply incorrect. Pet. at 22. As the court of appeals explained, "[o]ne of the EPA's objectives in its labeling regulations is the uniformity of labeling across the nation and among (1) different brands of the same pesticide, (2) different pesticides performing the same function, and (3) different pesticides posing the same or similar risks to health and the environment." *Papas*, 926 F.2d at 1025 (citing 40 C.F.R. pt. 156).

clear facility's intentional infliction of emotional distress due to employment termination was not preempted by federal statute intended to regulate nuclear safety); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (claim for personal injuries due to accidental fall from scaffolding caused by nuclear facility's breach of state scaffolding safety regulations was not preempted by federal statute intended to regulate nuclear safety).

Unlike the situation in each of those cases, where the subject matter of the tort claim was only on the fringes of the federal statute's regulatory field, petitioners' claims for injuries allegedly due to "inadequate" EPA-regulated and approved pesticide labeling fall squarely within one of FIFRA's principal regulatory purposes—regulation of pesticide labeling. Accordingly, this is not a case of "indirect" or "incidental" regulatory pressure enabling petitioners to circumvent preemption.[20]

D. There Is No Exception to Preemption in this Case for Allegedly "Inadequate" Data

Petitioners argue that preemption should not apply where EPA has approved a label "on the basis of false or inaccurate information." Pet. at 25. Yet, it has not been established in this case that EPA had "false or inaccurate" information, or lacked any data or information that it needed to regulate Paramite's labeling. Indeed, petitioners' assertion that "EPA was never informed that Zoecon's product contained benzene in extremely dangerous quantities" is what is false and misleading. Pet. at 26.

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[20] The third case cited by petitioners is distinguishable because Congress specifically provided for the type of claim that was brought. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-52, 256 (1983) (wrongful death claim for punitive damages due to radiation injuries at nuclear facility was not preempted by federal nuclear safety regulatory statute because Congress incorporated into statute indemnification scheme for such claims, thereby demonstrating its intent that such claims could be brought).

As Zoecon explains in its Counter-Statement of the Case, a minute and toxicologically insignificant amount of benzene was present as an unavoidable impurity in Sure Sol 190, one of Paramite's EPA-approved inert ingredients; Zoecon informed EPA of the presence of this impurity; EPA confirmed it is aware that benzene impurities are unavoidably present in aromatic petroleum-based inert ingredients such as Sure Sol 190; EPA also confirmed that it is not toxicologically concerned about benzene when it is present as an impurity in an inert; and as a result, EPA does not require pesticide manufacturers to identify or submit information regarding benzene impurities, and does not require pesticide labeling to identify or provide warnings regarding benzene impurities. See *supra* at 9-10. Thus, petitioners' arguments regarding a supposed exception to preemption when EPA lacks adequate data are completely hypothetical and have no applicability to this case.

Furthermore, as the court of appeals noted, it is EPA's function under FIFRA, not a jury's, to determine whether EPA possesses adequate data. *See Papas*, 926 F.2d at 1026 n.8; *supra* at 6 n.6.[21] The court refused to recognize an exception to preemption where, as here, "the federal statute involved explicitly prohibits state regulation of labeling." *Id.* For this reason, the court rejected the holding of *Hurley v. Lederle Laboratories*, 863 F.2d

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[21] FIFRA § 6(a)(2) provides that "[i]f at any time after the registration of a pesticide the registrant has additional factual information regarding unreasonable adverse effects on the environment of the pesticide, he shall submit such information to the Administrator." 7 U.S.C. § 136d(a)(2). EPA has indicated that this duty to report adverse effects information encompasses information that would affect its determinations as to necessary label precautions. *See* 40 C.F.R. § 153.78(a)(2) (1990); 43 Fed. Reg. 37,611, 37,613 (1978). FIFRA makes it unlawful for a pesticide registrant to fail to submit data required by § 6(a)(2). 7 U.S.C. § 136j(a)(2)(B)(ii).

1173, 1179 (5th Cir. 1988) "[t]o the extent that *Hurley* purports to recognize an exception." *Id.*[22]

E. Petitioners Cite the Wrong FFDCA Case Law in Making Their Analogy to FIFRA

Paramite, the EPA-registered and labeled pesticide product involved in this case, is not and never has been regulated under FFDCA. See *supra* at 8. Nor is Zoecon's Paramite the same as or similar to Upjohn's Mitaban, which has a different purpose, mode of action, and active ingredient, and unlike Paramite, is regulated as an animal drug under FFDCA. See *supra* at 9. Nevertheless, petitioners repeatedly and erroneously assert that Paramite is subject to both statutes (which FIFRA § 2(u), 7 U.S.C. § 136(u), precludes), and on that basis, attempt to compare FIFRA with FFDCA, which they contend does not preempt claims for inadequate drug warnings. Pet. at 4-5, 5 n.3, 6 n.4, 27-28.[23]

Petitioners' analogy to FFDCA is garbled. The "vast body" of FFDCA case law to which petitioners refer involves FFDCA's drug provisions, which differ signifi-

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[22] *Hurley* held that state law tort claims for inadequate warnings regarding FDA-regulated vaccines are preempted "assuming that the FDA has processed all of the relevant and available information on which to base the warning." *Id.* The court premised this holding on its understanding that FDA is a "partially passive agency" because it merely reviews whatever data are submitted by manufacturers, rather than specifying to manufacturers what data it needs to determine proper warnings. *Id.* The situation is entirely different under FIFRA, pursuant to which EPA plays an active and pervasive role, not only by intensively reviewing data submitted by manufacturers and determining what label warnings should be given, but also by specifying in detail what scientific data pesticide manufacturers must submit in order to obtain and maintain pesticide registrations. *See* 40 C.F.R. pt. 158.

[23] Petitioners' citation of *Wells v. Ortho-Pharmaceutical Corp.*, 788 F.2d 741 (11th Cir.), *cert. denied*, 479 U.S. 950 (1986), is misplaced, as that case did not involve preemption, and the court's citation of *Ferebee* was in an evidentiary context.

cantly from FIFRA since they do not expressly prohibit imposition of state requirements for labeling. Instead, petitioners should have cited the case law under the medical device provisions of FFDCA, which are the FFDCA provisions containing language virtually identical to FIFRA § 24(b).

Section 521 of the Medical Device Amendments to FFDCA provides in pertinent part that "no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) *which is different from, or in addition to,* any requirement applicable under this chapter to the device." 21 U.S.C. § 360k(a) (1988) (emphasis added).[24] A vast body of FFDCA case law holds that this provision preempts state law tort claims for inadequate labeling or warnings in connection with distribution of FFDCA-regulated medical devices (e.g., tampons). *See, e.g., Moore v. Kimberly-Clark Corp.*, 867 F.2d 243, 246 n.22 (5th Cir. 1989) (collecting cases); *Berger v. Personal Products, Inc.*, 115 Wash. 2d 267, 797 P.2d 1148, 1150 n.9 (1990) (collecting cases), *cert. denied*, 111 S. Ct. 1584 (1991). Thus, the FFDCA provisions with language similar to FIFRA § 24(b) are consistent with and *support* the holding of the *Papas* decision.[25]

F. The Court's Decision Does Not Leave Petitioners Without a Remedy

There is no principle that preemption is inapplicable where it deprives a plaintiff of legal remedies. "'[T]he relative importance to the State of its own law is not

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[24] States or political subdivisions may avoid preemption by applying to FDA for a specific exemption pursuant to 21 U.S.C. § 360k(b).

[25] In light of the FFDCA case law which overwhelmingly upholds preemption, there is no basis for petitioners' speculation that Upjohn believed Zoecon's FIFRA preemption motion would be "futile." Pet. at 6 n.4.

material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Thus, even "[a] state law action which shares the same purpose as the federal law in question is preempted if it attempts to achieve that purpose by a method which interferes with the federal methods." *Papas*, 926 F.2d at 1026.

Nevertheless, the court's decision does not leave the petitioners (or as they assert, other pesticide "victims") without a state law remedy. As Zoecon explains in its Counter-Statement of the Case, the court of appeals affirmed the district court's grant of *partial* summary judgment, as to warning-related claims only. See *supra* at 4-5. The district court's order makes it clear that petitioners are not preempted from proceeding against Zoecon on non-warning related manufacturing flaw and design defect product liability claims. *See* Pet. App. at 23-24. Furthermore, the district court's order does not apply to petitioners' claims against Upjohn Co., or to petitioners' separate suit against Koch, Zoecon's supplier of Sure Sol 190. Therefore, if certiorari is denied, petitioners will be free to proceed with their other, non-preempted claims.

III. THE PETITION SHOULD NOT BE HELD IN ABEYANCE

Petitioners request in the alternative that their petition be held in abeyance pending the Court's decision in *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991). Respondent Zoecon opposes this request because FIFRA preempts claims for inadequate pesticide labeling regardless of whether the Federal Cigarette Labeling and Advertising Act preempts cigarette failure to warn suits.

As petitioners concede, there are "significant differences between the Cigarette Act and FIFRA." Pet. at 13. For example, FIFRA, unlike the Cigarette Act, prohibits manufacturers from providing warnings that the federal government has not determined are warranted and approved. *See* 7 U.S.C. § 136j(a)(2)(A). Furthermore, FIFRA, unlike the Cigarette Act, incorporates a risk-benefit standard, recognizing that availability and use of pesticides confers substantial benefits upon society, including protecting public health and safety, the natural environment, and the agricultural economy. *See* 7 U.S.C. § 136(j), (x), (bb).

Petitioners' assertion that the argument for FIFRA preemption is "less compelling" than for Cigarette Act preemption lacks foundation. Pet. at 13. Their reliance on a lone footnote in a cigarette decision does not make their case. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 n.3 (1st Cir. 1987). That footnote misperceives EPA's total control over pesticide label warnings; confuses the states' authority to regulate pesticide use under FIFRA § 24(a) with the explicit prohibition in FIFRA § 24(b) against state regulation of labeling; and draws "a distinction without significance" regarding incorporation of required cigarette warnings into the text of the Cigarette Act. *Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989).

Regarding the final point, the footnote in *Palmer* fails to recognize that compared to pesticides, cigarettes are a relatively uniform product with relatively uniform risks; it would be impractical to specify in the text of FIFRA precise warning language for hundreds of currently registered pesticide products, which differ significantly from each other in toxicology and environmental behavior. Instead, through FIFRA, Congress assigned the task of regulating pesticide label warnings to EPA alone. That

is why the Eleventh Circuit was correct in holding that FIFRA preempts petitioners' labeling-related claims.[26]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 28, 1991

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[26] Except for *Cipollone*, where the respondent concurred in the certiorari petition, the Court has repeatedly denied review of product liability cases involving the question of federal preemption of state law tort claims. *See, e.g., Berger v. Personal Products, Inc.*, 115 Wash. 2d 267, 797 P.2d 1148 (1990), *cert. denied*, 111 S. Ct. 1584 (1991) (tampon warnings); *Graham v. Wyeth Laboratories*, 906 F.2d 1399 (10th Cir.), *cert. denied*, 111 S. Ct. 511 (1990) (DTP vaccine warnings); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 111 S. Ct. 147 (1990) (automobile air bags).

Supreme Court, U.S.
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No. 90-1837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT ZOECON CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF OF RESPONDENT ZOECON CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to R. 15.7, Respondent Zoecon Corporation [1] is hereby supplementing its opposition to the petition for a writ of certiorari by calling to the Court's attention the recent opinion of the U.S. Court of Appeals for the Tenth Circuit in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, —— F.2d ——, No. 91-1085 (10th Cir. Mar. 6, 1992) (text of opinion appended). *Arkansas-Platte* involved the same federal preemption issue for which certiorari is being sought herein, i.e.,

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[1] Parent companies and subsidiaries of Zoecon were identified in Zoecon's Brief in Opposition filed June 28, 1991.

whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988), preempts state law tort claims alleging that a pesticide manufacturer distributed its product with inadequate labeling or warnings. The Tenth Circuit agreed with the Eleventh Circuit's *Papas v. Upjohn Co.* decision at issue herein, holding that FIFRA impliedly preempts such state law tort claims. (App. at 7a-10a.)

Arkansas-Platte is the first court of appeals opinion on FIFRA preemption of tort claims since the Eleventh Circuit's decision in *Papas*. The opinion cites *Papas* throughout, and agrees with the Eleventh Circuit's conclusion that "awards of damages in these actions would result in direct conflict with federal law." (App. at 8a.)

> State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the accomplishment of the full purpose of [7 U.S.C.] § 136v(b), which is to ensure uniform labeling standards. *Papas* noted even if a state tort action accomplished the same goal as the federal statutory provisions, federal law would still preempt the state action because "it attempts to achieve that purpose by a method which interferes with the federal methods." [*Papas*,] 926 F.2d at 1026, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 497, 107 S. Ct. 805, 813 (1987).

(App. at 8a.)

The court of appeals in *Arkansas-Platte* expressly declined to follow the D.C. Circuit's 1984 anti-preemption holding in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). (App. at 9a-10a.) In particular, the court rejected *Ferebee*'s "choice of reaction" analysis, which was premised on the notion that state law damage awards have no regulatory effect. (App. at 9a-10a.) Further, the court of appeals explained that its opinion is bolstered by the Su-

preme Court's recent decision in *Wisconsin Public Intervenor v. Mortier*, —— U.S. ——, 111 S. Ct. 2476 (1991). (App. at 11a.) *Mortier* involved a different FIFRA preemption issue (whether FIFRA preempts local governments from regulating pesticide use), but made it clear that pesticide labeling "fall[s] within an area that FIFRA's 'program' pre-empts." 111 S. Ct. at 2487.

Respectfully submitted,

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Dated: March 19, 1992

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,
v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware Corporation,
Defendants-Appellants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

Appeal from the United States District Court
For the District of Colorado
D.C. No. 89-S-1726

[Filed Mar. 6, 1992]

Richard R. Young (Brent E. Rychener and Walter H. Sargent, with him on the briefs) of Holme Roberts & Owen, Colorado Springs, Colorado, for Plaintiff-Appellee.

David A. Bailey (Dean R. Massey and Anne D. Weber, with him on the briefs) of Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado, for Defendant-Appellant, Van Waters & Rogers, Inc.

C. Michael Montgomery (Peter S. Dusbabek, Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado; and Edward B. Fitzpatrick, III, The Dow Chemical Company, Midland, Michigan, with him on the briefs), of Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado, for Defendant-Appellant, The Dow Chemical Company.

Lawrence S. Ebner, McKenna & Cuneo, Washington, D.C.; Charles S. Siegel, Baron & Budd, P.C., Dallas, Texas; and Arthur H. Bryant and Priscilla Budeiri, Trial Lawyers for Public Justice, Washington, D.C., on the briefs for Amici Curiae.

Before LOGAN and MOORE, Circuit Judges, and ALLEY, District Judge.*

MOORE, Circuit Judge.

In 1985 plaintiff Arkansas-Platte & Gulf (AP&G) succeeded to ownership of property in Colorado which previously had been occupied by a wooden fence-post treatment facility. That facility used a pentachlorophenol product, "Dowicide 7," from approximately 1960 to 1972. In 1987, an AP&G employee was diagnosed with pentachlorophenol poisoning. AP&G filed suit in 1989 against Van Waters & Rogers and The Dow Chemical Company as pentachlorophenol manufacturers or distributors, asserting Colorado state tort claims of negligence and strict liability based on a failure to warn of the product's envi-

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* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

ronmental hazards. Dow and Van Waters & Rogers moved for summary judgment, asserting the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (FIFRA), preempts state common law tort claims based on labeling. The district court denied summary judgment, holding there was no express or implied preemption by FIFRA of state tort claims based on negligent failure to warn. *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474, 1482, 1484 (D. Colo. 1990).

On motion of the defendants, the district court certified this question for interlocutory appeal. We may take interlocutory appeals when there is a substantial question of law and an immediate appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). We review motions for summary judgment *de novo*. *City of Chanute, Kan. v. Williams Natural Gas Co.*, —— F.2d ——, 1992 WL 12682, at *2 (10th Cir. 1992). *See also Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987). If no genuine issue of material fact exists, we determine if the substantive law was correctly applied. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990), citing *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). There is no dispute of fact on the preemption issue before us. The parties disagree about (1) what body of FIFRA law should be applied, and (2) whether state law is preempted. We reverse the denial of summary judgment to the defendants, and hold FIFRA impliedly preempts state tort actions based on labeling and alleged failure to warn.

I. Applicable Law

AP&G argues its claims originate from actions occurring from 1960 to 1972, and thus FIFRA provisions enacted in 1972 cannot affect defendants' pre-exposure duties. In the alternative, AP&G asserts neither the 1947 Act nor the 1972 amendments preempt state common law

failure to warn claims, and the distinction is unimportant. We disagree with both arguments.

While pre-1972 FIFRA law concerning labeling is similar to the legal regime set forth in the 1972 amendments, it is not identical. FIFRA was enacted in 1947 as a licensing and labeling statute replacing the Insecticide Act of 1910. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S. Ct. 2862, 2866 (1984). The 1947 Act gave the Agriculture Department authority to regulate, register, and label "economic poisons and devices." *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989). There was no provision in the 1947 Act, however, specifically restricting state authority over pesticide labels.

In contrast, the 1972 amendments significantly strengthened the Act's registration and labeling standards, constructing a comprehensive regulatory regime. *Wisconsin Pub. Intervenor v. Mortier*, —— U.S. ——, 111 S. Ct. 2476, 2480 (1991), citing *Ruckelshaus*, 467 U.S. at 991, 104 S. Ct. at 2867. The 1972 provisions sought to "regulate the use of pesticides to protect man and his environment," and "extend Federal pesticide regulations to actions *entirely within a single State.*" *Kennan*, 717 F. Supp. at 804, citing S. Rep. No. 92-838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993. Section 136v, addressing the "authority of states" provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide . . . in the State, but *only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.*
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect *any requirements for labeling or packaging in addi-*

> *tion to or different from* those required under this subchapter.

7 U.S.C. § 136v(a), (b) (emphasis added).

A plain reading of the statute indicates an intent to maintain the traditional police powers of the states in the general grant of authority to "regulate the sale or use" of pesticides, § 136v(a), and a more specific intent to occupy the field in labeling and packaging, § 136v(b). Section 136v(c) further examines the states' prerogatives for registering pesticides for uses to meet special local needs. Clearly if the 1947 Act did not specifically restrict state authority over labeling, the 1972 amendments instruct a different interpretation of the preemption of state law.

Like the district court, we find plaintiff's contention that we should apply pre-1972 FIFRA law unavailing. AP&G relies on *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 799 (1991), arguing the application of current FIFRA law to past events would present a question of retroactivity. *DeVargas* addressed the retroactive application of statutory amendments which became effective during the pendency of that litigation. The court held in the absence of clear congressional intent instructing retroactive application, the law should be applied prospectively. *DeVargas*, 911 F.2d at 1388, 1393.[1]

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[1] *DeVargas* found two lines of Supreme Court precedent, *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006 (1974), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988), were in "irreconcilable conflict" in applying statutes whose intent on retroactivity is unclear. *DeVargas*, 911 F.2d at 1390. *Bradley* held when congressional intent is unclear, " 'a court is to apply the law in effect at the time it renders its decision,' " except where application of the law would result in "manifest injustice." *DeVargas*, 911 F.2d at 1388-389, citing *Bradley*, 416 U.S. at 711, 94 S. Ct. at 2016. *DeVargas* found *Bowen* stated a contrary rule, that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their

If this case presented a question of retrospective application of a statute, we would indeed apply *DeVargas*. The issue here, however, does not concern retroactivity, but rather when plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989. Even were we to assume plaintiff's cause of action ripened prior to 1972, we have said it is "fundamental" that "a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment." *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972), citing *Cox v. Hart*, 260 U.S. 427, 43 S. Ct. 154 (1922). *DeVargas* is therefore not on point.

Furthermore, any jury award on claims arising from a duty to label or warn has an impact on FIFRA as it presently exists. As the court stated in *Kennan v. Dow Chem. Co.*, "[w]hether or not the decedent was exposed prior to 1972 does not negate the fact that a jury award today would constitute regulation by causing manufacturers to change their labels . . . . Congress has expressly preempted such regulation by the states." 717 F. Supp. at 811. We therefore apply FIFRA as amended.

II. Preemption Doctrine

The preemption doctrine is based on the Supremacy Clause of Article Six of the Constitution. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws that "interfere with, or are contrary to" federal law. *Hillsborough Country, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 2375 (1985),

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language requires this result." *DeVargas*, 911 F.2d at 1389, citing *Bowen*, 109 S. Ct. at 471. "Faced squarely with the issue [of] . . . which presumption—*Bradley* or *Bowen*—is to govern," the *DeVargas* court found *Bowen* was supported by the weight of Supreme Court authority, and held the Civil Rights Restoration Act of 1987 did not apply retroactively. *DeVargas*, 911 F.2d at 1392-93.

citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.). The burden of proving preemption is on defendants, who must show Congress meant FIFRA to preempt state tort claims based on failure to warn.

Preemption turns on the intent of Congress and on the effect of the conflicting rule. Intent may be express, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977), or inferred when Congress has chosen to occupy a particular field and "a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. at 2481, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). Even when the field is not occupied, we may still infer preemption to the extent state and federal law conflict. This may be when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217-18 (1963), when federal law implies a barrier to state regulation, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986), citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).

III. Failure to Warn Claims Based on Labeling

Several courts have considered whether FIFRA preempts state tort claims based on labeling and alleged failure to warn with conflicting results. The Eleventh Circuit held state common law tort labeling claims are impliedly preempted by FIFRA, 7 U.S.C. § 136v(b). *Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3825 (U.S.

May 29, 1991) (No. 90-1837).[2] While FIFRA explicitly instructs states can regulate the *sale or use* of federally registered pesticides, § 136v(b) precludes "any requirements for *labeling or packaging* in addition to or different from those required pursuant to this act." *Id.* (emphasis added). The *Papas* court reasoned jury awards of damages in these actions would result in direct conflict with federal law. *Id.* at 1025. We agree.

The Administrator of the EPA is charged under the statute with determining whether the pesticide "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). The EPA considers these adverse effects in determining what labels comply with FIFRA's requirements. 7 U.S.C. § 136a(c)(5)(B). The labels " 'must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.' " *Papas*, 926 F.2d at 1024, citing 40 C.F.R. § 156.10(i)(1)(i).

State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards. *Papas* noted even if a state tort action accomplished the same goal as the federal statutory provisions, federal law would still preempt the state action because "it attempts to achieve that purpose by a method which interferes with the federal methods." 926 F.2d at 1026, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 497, 107 S. Ct. 805, 813 (1987).

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[2] *Compare Kennan v. Dow Chem. Co.*, 717 F. Supp. at 807 ("FIFRA expressly preempts state law regulation of pesticide labeling . . . ."); *and Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406 (E.D. Mich. 1987) ("Congress has expressly stated its intent to preempt any state labeling or packaging requirements different from or additional to those mandated by FIFRA," citing § 136v(b)).

We decline to follow the D.C. Circuit's holding in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545 (1984), as suggested by AP&G. *Ferebee* involved a suit by the estate of an agricultural worker against Chevron alleging Chevron's failure to label paraquat with an adequate warning caused Mr. Ferebee's lung disease and subsequent death. The D.C. Circuit held the tort action was not preempted by FIFRA, basing its holding on the general grant of authority to the states in § 136v(a) to regulate the use of FIFRA-controlled products within state borders. *Ferebee*, 736 F.2d at 1541. We do not agree with the D.C. Circuit that because labeling can be part of the compensatory objectives of the state in regulating use, the general grant of § 136v(a) encompasses authority over labeling.[3] Section 136v(b) clearly narrows the general grant of § 136v(a) to *exclude* "requirements for labeling or packaging."

Ferebee distinguished between the "direct" injunction against the states' imposing labeling requirements and requirements which might be imposed through state common law. *Id.* The court reasoned the EPA's determination that Chevron's label was adequate *"for FIFRA purposes* does not compel a jury to find that the label is also adequate *for purposes of state tort law . . . ."* *Ferebee*, 736 F.2d at 1540 (emphasis in *Ferebee*). *Ferebee* further stated:

> The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden

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[3] "Given this provision [§ 136v(a)], Maryland might well have the power to ban paraquat entirely . . . . As a result, Maryland is entitled to control the use of paraquat for compensatory aims by holding Chevron liable for injuries that could have been prevented by a more adequate label." *Ferebee*, 736 F.2d at 1541.

> on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label . . . .

Ferebee, 736 F.2d at 1541.[4]

We do not accept this "choice of reaction" analysis. A business choice between paying damages and changing the label is only notional. As the First Circuit stated in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987):

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take . . . is to change its label.

Id. at 627-28. This choice cannot be consistent with FIFRA's preclusion of "any requirements for labeling or packaging in addition to or different from" the statutory mandate. 7 U.S.C. § 136v(b).

AP&G relies on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984), which stated there was no "irreconcilable conflict between the federal and state standards," and that the "imposition of a state standard in a damages action" would not "frustrate the objectives of the federal law." 464 U.S. at 256, 104 S. Ct. at 626. We distinguish *Silkwood* because it construes the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, a statute with substantially different regulatory and safety goals from FIFRA. The Atomic Energy Act contains no pre-

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[4] *See also Ferebee*, 736 F.2d at 1542 ("Compliance with both federal and state law cannot be said to be impossible: Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.").

emption provision and reserves significant authority to the states. "Further, the enactment and legislative history [of the Act] make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue." *Palmer v. Liggett Group*, 825 F.2d at 628. In contrast, FIFRA does specify restrictions on state authority in labeling, and the legislative history of FIFRA is not clear on the question of state common law tort actions based on labeling and failure to warn.

Our thinking is bolstered by the Supreme Court's recent decision in *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In *Mortier*, a Wisconsin town granted plaintiff a permit for pesticide spraying with certain use restrictions. Plaintiff claimed the town ordinance was preempted by FIFRA and state statute. The Supreme Court disagreed, holding FIFRA did not preempt political subdivisions from regulating the *use* of pesticides, "either explicitly, implicitly, or by virtue of an actual conflict." *Id.* at 2482. The Court found FIFRA had not occupied the field of pesticide regulation in general or of local use permitting in particular. *Id.* at 2486. According to *Mortier*, the specific grant of authority in § 136v(a) ensures the states can "continue to regulate *use and sales* even where, such as with regard to the banning of *mislabeled products*, a *narrow pre-emptive overlap* might occur." *Id.* (emphasis added).

This "narrow preemptive overlap" is precisely the issue before us. In dicta addressing FIFRA's preemption of labeling claims, the Court stated:

> [F]ield pre-emption cannot be inferred. In the first place, § 136v itself undercuts such an inference. The provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under"

> FIFRA. 7 U.S.C. § 136v(b). *This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation.*

Id. at 2486 (emphasis added).[5]

Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use*. The Court indicated, however, Congress had impliedly preempted state regulation in the more narrow area of *labeling*. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.* at 2479, we are nevertheless inclined to adopt its construction of FIFRA.[6]

IV. Summary

We therefore hold state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law. This is by virtue of the direct conflict posed with federal uniform regulation of pesticides, and because we believe Congress intended to occupy the field of pesticide labeling regulation. We base our

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[5] *See also* 111 S. Ct. at 2487. "As we have . . . made plain, local use permit regulations—*unlike labeling or certification*—do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses." (emphasis added).

[6] Several district courts have considered preemption with respect to labeling and failure to warn claims since *Mortier* and followed its dicta. *See, e.g., Young v. American Cyanamid Co.*, Civ. No. B-C-90-89 (E.D. Ark. N.D. Oct. 21, 1991) (unpublished order); *Worm v. American Cyanamid Co.*, Civ. A. No. HAR-90-1424, 1991 WL 144328 (D. Md. July 12, 1991) (unpublished opinion). *Cf. Montana Pole & Treating Plant v. I.F. Laucks*, 775 F. Supp. 1339 (D. Mont. 1991) (adopting *Ferebee* and declining to follow *Papas* in case involving labeling of pentachlorophenol). In our opinion, *Montana Pole* wrongly relies on *Mortier* without considering the Court's distinction between preemption of state regulation of the *sale and use* of pesticides, and state authority over *labeling*. *Montana Pole*, 775 F. Supp. at 1344.

holding on the language of § 136v, our rejection of the *Ferebee* court's "choice of reaction" analysis, and our understanding of the Supreme Court's construction of FIFRA in *Mortier*. We need not reach the district court's holding there is no express FIFRA preemption, and emphasize our holding only concerns the narrow issue of labeling. We do not address other state tort claims by AP&G which may be pending against the defendants.[7]

We therefore REVERSE the decision of the district court denying defendants' summary judgment on plaintiff's state tort claims based on labeling and failure to warn, and REMAND for further proceedings.

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[7] *See, e.g., Kennan*, 717 F. Supp. at 812 (while finding express preemption of failure to warn claims in § 136v(b), court "state[d] no view as to whether . . . defense of unavoidable dangerousness ha[d] been preempted"); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989) (FIFRA preempts common law failure to warn claims, but not claims that herbicide sold in unreasonably dangerous condition).

Supreme Court, U.S.
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No. 90-1837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SECOND SUPPLEMENTAL BRIEF OF RESPONDENT ZOECON CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to R. 15.7, Respondent Zoecon Corporation [1] is hereby supplementing its opposition to the petition for a writ of certiorari by calling to the Court's attention the June 19, 1992 opinion of the U.S. Court of Appeals for the Fourth Circuit in *Worm v. American Cyanamid Co.*, —— F.2d ——, No. 91-1749 (4th Cir. June 19, 1992) (text of opinion appended). The Fourth Circuit in *Worm*, like the Tenth Circuit in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992),[2] joins the Eleventh Circuit in the instant case in holding that state law tort claims based on allegations of inadequate pesticide labeling or warn-

[1] Parent companies and subsidiaries of Zoecon were identified in Zoecon's Brief in Opposition filed June 28, 1991.

[2] Respondent submitted the Tenth Circuit's opinion in *Arkansas-Platte* as a supplemental authority on March 19, 1992.

ings are impliedly preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990).[3]

Worm is a crop damage case which includes allegations of inadequate labeling and failure to warn. The court of appeals held that FIFRA § 24(b), 7 U.S.C. § 136v(b)

> manifestly ordains the preemption of the establishment or enforcement of any common law duty that would impose a labeling requirement inconsistent with those established by FIFRA or the EPA in its regulations. If to avoid breaching a state duty a pesticide producer is required to revise its pesticide labeling, then the duty, common law or otherwise, is preempted by § 136v(b).

(App. at 15a (citations omitted).)

In reaching this conclusion, the court of appeals relies in part on the Eleventh Circuit's *Papas v. Upjohn Co.* opinion at issue herein. Further, the court, like the Eleventh Circuit in *Papas* and Tenth Circuit in *Arkansas-Platte*, rejects the anti-preemption reasoning of the D.C. Circuit in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). The Fourth Circuit finds "illusory" the distinction drawn in *Ferebee* between state law tort damages for inadequate warnings and the compulsion to alter pesticide labels to avoid such damages:

> We find the distinction illusory. If federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict. The

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[3] The Eleventh Circuit's holding in the instant case is further supported by the Supreme Court's decision announced today in *Cipollone v. Liggett Group, Inc.*, No. 90-1038 (U.S. June 24, 1992). FIFRA's express preemption provision, 7 U.S.C. § 136v(b), which prohibits States from imposing "any requirements for labeling . . . in addition to or different from" those required under FIFRA, is analogous to the express preemption provision in the 1969 version of the Federal Cigarette Labeling and Advertising Act.

manufacturer in that case cannot comply with both. Implicit in the Worms' argument is a notion that common law tort duties are not regulatory. *But surely a jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation requiring the insertion of a specific warning on the pesticide label.* Whether the standard is imposed by statute or common law, a pesticide maker willing to continue to face the consequences of its failure to change the warning is perfectly free to continue to market its product. And *just as there can be no doubt that the state legislation would constitute a "requirement for labeling," so too does the conflicting common law duty fall within the scope of § 136v(b).*

(App. at 11a-12a (emphasis added) (citation omitted).[4]

Respectfully submitted,

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Dated: June 24, 1992

[4] The Supreme Court of Arkansas recently recognized that "[t]he Ferebee rationale that a manufacturer can comply with both federal and state law by continuing to use the EPA approv[ed] label and paying damages to successful plaintiffs has met with sharp, justified criticism." *Ciba-Geigy Corp. v. Alter*, No. 91-235, 1992 WL 117164, at *8 (Ark. May 26, 1992). Nevertheless, that state supreme court held that FIFRA does not preempt state law tort claims for inadequate pesticide labeling. In reaching that erroneous conclusion, the court failed to understand that FIFRA mandates nationally uniform (i.e., identical) labeling for each pesticide product, and that such uniformity would be difficult if not impossible to maintain if a pesticide manufacturer is barraged with different, inconsistent, or conflicting warning requirements imposed by individual juries throughout the United States.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1749

JAMES T. WORM, SR.; JAMES T. WORM, JR.; ROBERT C. WORM, d/b/a Worm Brothers, d/b/a Jim Bob Farms, Copartners,
Plaintiffs-Appellants,

v.

AMERICAN CYANAMID COMPANY, a body corporate of the State of Maine,
Defendant-Appellee,

and

SOUTHERN STATES COOPERATIVE, INCORPORATED, d/b/a Southern States Cooperative, Incorporated—Preston Service, a body corporate of the State of Virginia; SOUTHERN STATES PRESTON COOPERATIVE, INCORPORATED, a body corporate of the State of Virginia,
Defendants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION,
Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
John R. Hargrove, District Judge.
(CA-90-1424-HAR)

Argued: February 4, 1992

Decided: June 19, 1992

Before WIDENER and NIEMEYER, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener and Judge Ellis joined.

ARGUED: Mark Ira Cantor, CANTOR & HOWARD, P.A., Baltimore, Maryland; Delverne A. Dressel, Baltimore, Maryland, for Appellants. Raymond Gerard Mullady, Jr., PIPER & MARBURY, Baltimore, Maryland, for Appellee. ON BRIEF: Brigit A. McCann, PIPER & MARBURY, Baltimore, Maryland, for Appellee. Lawrence S. Ebner, MCKENNA & CUNEO, Washington, D.C., for Amicus Curiae.

OPINION

NIEMEYER, Circuit Judge:

In this appeal we consider for the first time the extent to which the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988), preempts state common law contract and tort actions which touch upon the field of pesticide packaging or labeling. The district court, after considering carefully the only circuit decisions that had by then addressed the question, *Papas v. Upjohn Co.*, 926 F.2d 1019, 1026 (11th Cir. 1991) (holding that FIFRA preempts common law tort actions that are based on the alleged mislabeling of a pesticide), *petition for cert. filed*, 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837), and *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541-42 (D.C. Cir.) (apparently reaching the opposite result), *cert. denied*, 469 U.S. 1062 (1984), determined that all of plaintiffs' state common law tort claims and breach of warranty claims for crop damages caused by a pesticide are "preempted by FIFRA as a matter of law." [1]

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[1] Since the district court issued its decision, an additional circuit has spoken on this subject. *See Arkansas-Platte & Gulf Partnership*

Applying traditional principles of preemption, we conclude that Congress did not, expressly or by implication, preempt *the field* of pesticide regulation or a more narrowly defined field. Nevertheless, to the extent that Maryland law imposes a duty to provide a warning "in addition to or different from" federal pesticide labeling standards, it is preempted by *conflicting* with federal law. Because plaintiffs' complaint, however, alleges claims apart from those preempted, we vacate the judgment and remand the case for reconsideration in accordance with this opinion.

I

James T. Worm, Sr., James T. Worm, Jr., and Robert C. Worm, who are engaged in commercial farming in Caroline County, Maryland, used a weed killer, known as "Scepter," on their soybean crop in the spring of 1987. Scepter is manufactured by American Cyanamid Company and, like almost all herbicides that are made, sold, or used in this country, is subject to federal regulation by the Environmental Protection Agency (EPA). Scepter is registered with the EPA in accordance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988).

In early May 1988, just more than eleven months after the initial application of Scepter to the soybean crop by the Worms, they planted sweet corn on 74 of the 114 acres which were treated with the herbicide. The Worms claim they considered the land to be safe for growing corn at that time because of the instructions on the Scepter label. Those instructions provided:

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v. Van Waters & Rogers Inc., No. 91-1085, 1992 U.S.App. Lexis 3572, at *5 (10th Cir. Mar. 6, 1992) (adopting *Papas* view that FIFRA implicitly preempts the field of pesticide labeling); *cf. Chemical Specialties Mfrs. Ass'n. v. Allenby*, No. 90-16485, 1992 U.S. App. Lexis 3808, at *22 (9th Cir. Mar. 11, 1992) (avoiding question of whether advertising requirements in California Safe Drinking Water and Toxic Enforcement Act frustrate congressional purpose of FIFRA, since compliance with both state and federal provisions is possible).

ROTATIONAL CROP RESTRICTIONS

The following rotational crops may be planted after applying SCEPTER at recommended rates in soybeans:

1. Four months after last SCEPTER application:

   Small Grains
   Rice

2. Eleven months after last SCEPTER application

   Corn
   Cotton
   Edible beans
   Grain sorghum
   Peanuts
   Tobacco[.]

Materials distributed for the purpose of promoting the sale of Scepter likewise represented that corn could be safely planted eleven months after the application of Scepter to soybeans. These materials also warned that "[c]rops other than soy beans, such as cotton, corn, or vegetables may be injured by spray drift or other indirect contact with SCEPTER."

The Worms' crop failed. After the corn was found to be below commercial standards for sale, the Worms chopped and plowed under the entire crop. Although American Cyanamid maintains that the corn crop failed for reasons other than the application of Scepter to the Worms' fields, the company admits that it has experienced what is termed a "carryover effect" with Scepter, i.e., traces of the weed killer tend to remain in the soil for a longer time than originally predicted. This carryover can be devastating to crops, such as corn, which are particularly susceptible to destruction by Scepter. Indeed, American Cyanamid subsequently amended the label and promotional materials for Scepter "to avoid any future problems of this nature."

Following the destruction of the corn crop, the Worms filed suit in state court against American Cyanamid and its distributor, alleging that the loss of the crop was a proximate result of Scepter's carryover effect. In their complaint, the Worms alleged that the crop damage was caused by American Cyanamid's negligence in (1) "failing to adequately test" its product, (2) "failing to properly formulate" its product, (3) manufacturing Scepter "in non-conformity with its specifications and formulations," (4) marketing Scepter with knowledge that the label was inaccurate, and (5) "failing to warn users" that it was unsafe to plant sweet corn eleven months after applying Scepter to soybeans. The Worms also complained that American Cyanamid should be held strictly liable in tort for failing to warn of the condition of its defective product and that Scepter did not conform to express and implied warranties by the seller.

American Cyanamid removed the case to federal court based on diversity of citizenship and moved for summary judgment on the ground that the FIFRA preempts all of the Worms' claims. Reading their claims as essentially alleging that American Cyanamid failed in its duty to warn of a defective condition, the district court concluded that FIFRA, which provides no expressed private causes of action for damages, preempts all of plaintiffs' claims and therefore entered summary judgment in favor of American Cyanamid wth respect to all claims. The Worms now appeal.

II

The principles of preemption resolve conflicts between federal and state law on the authority of Article VI of the Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

> the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, § 2. From this Supremacy Clause flows the well-established principle that federal legislation, if enacted pursuant to the Congress' constitutionally delegated authority, can nullify conflicting state or local actions. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

Preemption may occur on two bases, the first of which turns on discovering the intent of Congress. Congress may expressly provide that federal law supplants state authority in a particular field or its intent to do so may be inferred from its regulating so pervasively in the field as not to leave sufficient vacancy within which any state can act. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But even absent an express or implied congressional intent to preempt state authority in a field, state law is nevertheless preempted by operation of law to the extent that it actually conflicts with federal law. *See Wisconsin Public Intervenor v. Mortier*, —— U.S. ——, 111 S.Ct. 2476, 2482 (1991); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 204 (1983).

Several underlying presumptions have been developed to aid in discovering the intent of Congress when it has not clearly expressed it and to determine when a conflict between state and federal law exists. In the circumstance where Congress is claimed to have preempted by implication a field of law traditionally occupied by state law, our jurisprudence and principles of federalism dictate that we presume that Congress did not intend to nullify state law unless a contrary intent is "clear and manifest." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice*, 331 U.S. at 230). Particularly when it is urged that a deep-rooted body of product liability law has been preempted in a manner that effectively repeals long-standing state law remedies, we should be fairly

assured of the congressional intent, because we must assume that the balance between federal and state law will not be disturbed "unintentionally by Congress or unnecessarily by the courts." *Jones*, 430 U.S. at 525; *see also United States v. Bass*, 404 U.S. 336, 349 (1971). When we address the question of whether state law actually conflicts with federal law, we resolve the more specific inquiries of whether "it is impossible to comply with both state and federal law" or "whether the state law stands as an obstacle to the accomplishment of the full purposes and objectives" of federal law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

With these principles stated, we proceed to an examination of FIFRA, first to determine if Congress intended by its enactment to supplant state authority in the field, and if not, whether state tort and warranty law conflicts with the federal regulatory scheme.

III

FIFRA, enacted originally in 1947 as a pesticide licensing and labeling statute, "was designed to work in harmony with the uniform state insecticide, fungicide and rodenticide act which was adopted in many States." S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972) *reprinted in* 1972 U.S.C.C.A.N. 3993, 3999. The Act was amended in 1972 to strengthen its standards and to increase the EPA's authority for enforcement. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). The amendments, which were prompted by safety and environmental concerns, as well as "a growing perception that the existing legislation was not equal to [its] task" transformed FIFRA into "a comprehensive regulatory statute," regulating the labeling, sale, and use of pesticides both in intrastate and interstate commerce. *Id.*

On the subject of FIFRA's intended effect on related or analogous state laws, 7 U.S.C. § 136v, entitled "Authority of States," provides:

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect *any requirements for labeling or packaging in addition to or different from those required under this subchapter.*

(emphasis added). There is no language that provides that FIFRA supplants state authority in the field of registering, using, selling, or labeling pesticides, except to the extent stated in § 136v. When we consider therefore whether in FIFRA Congress expressed an intent to occupy the entire field of pesticide regulation, we find no language to that effect, nor does the legislative history suggest it. *See Mortier*, 111 S.Ct. at 2484 & n.4. And the Congress has not failed to make such preemption clear when it desired to do so. *See, e.g.*, Domestic Housing and Int'l Recovery and Financial Stability Act of 1983, 12 U.S.C. § 1715z-17 (d), -18(e) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301 (a) (preempting rights "under common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (preempting all state "laws, decisions, rules, regulations, or other State action having the effect of law").

Our consideration of the question whether Congress, *by implication*, preempted state authority in the field by adopting a comprehensive regulation leaving no room for state maneuver in the field need not occupy us long because the Supreme Court has already resolved the issue. In *Mortier*, the Court stated:

> [W]e reject the position of some courts, but not the court below, that the 1972 amendments trans-

> formed FIFRA into a comprehensive statute that occupied the field of pesticide regulation . . . .
>
> More importantly, field preemption cannot be inferred.
>
> * * * *
>
> While the 1972 amendments turned FIFRA into a "comprehensive regulatory statute," *Monsanto*, 467 U.S. at 991, 104 S. Ct., at 2867, the resulting scheme was not "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice*, 331 U.S., at 230, 67 S.Ct., at 1152.
>
> * * * *
>
> FIFRA . . . leaves substantial portions of the field vacant . . . .

111 S. Ct. at 2485-86. And addressing the specific interpretation of § 136v(a), with regard to whether that section reveals a grant of authority to the states consistent with preemption of the field or an intent to leave open areas for state regulation consistent with an intent not to preempt, the Court concluded:

> The specific grant of authority in § 136v(a) consequently does not serve to *hand back* to the States powers that the statute had impliedly usurped. Rather, it acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.

Id. at 2486 (emphasis added).

By force of the same analysis conducted by the Supreme Court in *Mortier* to reach the conclusion that FIFRA does not preempt the field of regulating pesticides, expressly or by implication, we hold that Congress also did not reveal an intent to preempt any less broadly defined field. There is simply no evidence that Congress intended to supplant state authority in a field beyond the

applicable scope of its own legislation. On the contrary we see in § 136v(b) only a statement of the limits of the federal objectives underlying FIFRA for purposes of a Supremacy Clause analysis, and not an intent to usurp all power, even in the narrow field of pesticide labeling. Accordingly, we must address whether, by operation of § 136v(b) and the Supremacy Clause, state tort and warranty law is preempted because of conflicts with FIFRA. To resolve that question we are instructed to determine whether it is "impossible to comply with both state and federal law" or whether "state law stands as an obstacle to the accomplishment of the full purposes and objectives" of federal law. *Silkwood*, 464 U.S. at 248.

IV

Section 136v(a) expressly prohibits a state from permitting a *sale* or *use* of a pesticide that is prohibited by the federal law, and § 136v(b) prohibits any state *labeling* requirement "in addition to or different from" that imposed by federal law.

Because there is no suggestion in this case that federal law prohibits the sale or use of Scepter, we conclude that the statute does not preempt any state law which might regulate Scepter's *sale and use*. With respect to *labeling*, however, the federal law sets forth detailed requirements, *see* 40 C.F.R. § 156.10 (1991), and directs that no additional or different labeling requirement may be imposed by the states. 7 U.S.C. § 136v(b). Thus if to comply with Maryland law, American Cyanamid must violate federal law, the state law must yield. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Similarly state law must yield if in complying with it, American Cyanamid would be frustrating the objectives and purposes of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In this regard, our task is made easier by the passage of § 136v in which Congress has expressed its view that only state labeling

requirements that are "in addition to or different from" the federal standards will frustrate its purpose. Thus if state law adopts or imposes a labeling requirement that is the same as the federal standard, even if the state law provides compensation or other remedies for a violation, so long as Congress chooses not to explicitly preempt the consistent law, it will not be said to be in conflict with federal law. *See Silkwood*, 464 U.S. at 256 ("No doubt there is tension between the conclusion that safety regulation [of nuclear energy] is the exclusive concern of the federal law and a conclusion that a State may nevertheless award damages based on its own law of liability . . . [but because] Congress intended to . . . tolerate whatever tension there was . . . [w]e can do no less.").

The Worms argue that state tort law, which provides a remedy for failure to provide an adequate warning to consumers can lead only to the payment of damages and not to a required label alteration. The distinction, they argue, avoids a conflict situation. In support, they rely on *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541 (D.C. Cir.) (holding that "if a state chooses to restrict pesticide use by requiring that the manufacturer compensate for all injuries or for some of these injuries resulting from the *use* of a pesticide, federal law stands as no barrier"), *cert. denied*, 469 U.S. 1062 (1984).

We find the distinction illusory. If federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict. The manufacturer in that case cannot comply with both. Implicit in the Worms' argument is a notion that common law tort duties are not regulatory. But surely a jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legisla-

tively enacted state regulation requiring the insertion of a specific warning on the pesticide label. Whether the standard is imposed by statute or common law, a pesticide maker willing to continue to face the consequences of its failure to change the warning is perfectly free to continue to market its product. And just as there can be no doubt that the state legislation would constitute a "requirement for labeling," *cf. Jones*, 430 U.S. at 530-32, so too does the conflicting common law duty fall within the scope of § 136v(b). As the Court of Appeals for the Eleventh Circuit stated in *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837), "Allowing state common law tort actions based on labeling claims would permit state court juries to do what state legislatures . . . are forbidden to do: impose requirements for labeling pesticides." *Id.* at 1026.

The Worms also argue that even if state common law suits can be termed labeling requirements within the meaning of § 136v(b), all of the several specific tort and contract claims brought by them in this case are not inconsistent with those labeling requirements established by Congress in FIFRA or by the EPA in its regulations made pursuant to congressional directive. We agree. For example, the complaint alleges that American Cyanamid negligently failed *to test* Scepter to determine its "carryover" effect on rotational crops such as sweet corn. Whatever might be said with regard to some common law actions, we fail to see how a state-imposed standard of care relating to product design, manufacture, testing, and the like, can qualify as a labeling requirement under FIFRA. Likewise, where a state enables a purchaser of goods wholly or partially to rescind the sale of a pesticide which did not live up to the merchant's representations as to quantity, quality, or performance, then,

in many circumstances, it cannot be said that the rescission is a regulation of labeling.[2]

Finally, important to our Supremacy Clause analysis is the fact that FIFRA does not purport to preempt every requirement for labeling. Only state labeling requirements that are "in addition to or different from" those federally established requirements are forbidden. *See* 7 U.S.C. § 136v(b). While we have not previously addressed the scope of this language, in *Jones*, 430 U.S. at 528-32, the Supreme Court considered an interpretation of a similar preemption provision in the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 678. Noting that § 678 prohibits the imposition of "marking, labeling, packaging, or ingredient requirements *in addition to, or different than*, those made under" the FMIA (emphasis added), the Court invalidated a California law regulating meat labeling. *Jones*, 430 U.S. at 532. However, the Court did not reason that the mere existence of a state label regulation offended the "in addition to, or different than" preemption clause. Rather, it held

> the state law's requirement—that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing variations—is "different than" the federal requirement, which permits manufacturing deviations *and* variations caused by moisture loss during good distribution practice.

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[2] With some limited exceptions, 7 U.S.C. § 136(p) defines "labeling" as all "written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers" as well as "all other written, printed, or graphic matter—(A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide or device." While this definition is quite broad, it would not appear to include general advertising statements not made in connection with a particular sale. *See New York State Pesticide Coalition v. Jorling*, 874 F.2d 115, 120 (2d Cir. 1989) (noting EPA's position that " 'labeling' comprises those materials designed to accompany the product through the stream of commerce to the end user").

Id. at 531-32. Indeed, if the sole fact that a state chooses to regulate labeling, in any manner, were to constitute a state labeling requirement "in addition to" the federal scheme, then the "or different from" language would be read completely out of § 136v(b). Such a reading would violate commonly understood principles of statutory construction. *See, e.g., United States v. Hood*, 343 U.S. 148, 151 (1952) ("[W]e should not read out what as a matter of ordinary English speech is in."). We therefore construe the prohibition against state labeling requirements "in addition to" those in FIFRA to preempt the imposition of categories of labeling restrictions not provided by the federal law. While it may seem unlikely that new categories of labeling requirements could be established, given the breadth of the EPA's labeling regulations in force today, *see* 40 C.F.R. § 156.10 (1991) (regulating contents, legibility, prominence, and, in certain cases, actual language to be used on pesticide labeling), it must be remembered that FIFRA, as written, contained few actual pesticide labeling restrictions. *See generally*, 7 U.S.C. §§ 136 - 136y. The need for labeling and packaging regulations was thus left largely to the discretion of the then newly established EPA. *See* 7 U.S.C. § 136w. With regard to the types of labeling restrictions which do exist, we conclude that the states may regulate so long as any state law is not "different from" the federal standard. While we have not been advised that Maryland has done so legislatively, at oral argument counsel for the Worms observed correctly that if the Maryland common law recognizes a tort based on breach of a federally imposed standard, the Worms would be able to pursue that claim without conflicting with federal law.

We find support for our strict standard in determining whether a conflict exists in the recognition that FIFRA does not explicitly create a federal right of action to compensate persons who may be injured by misleadingly labeled pesticides. For "[i]t is difficult to believe that

Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251; *see Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989) (en banc) (rejecting statutory construction of federal securities act that might preempt contribution under state law).

In summary, we hold that the language of § 136v(b) manifestly ordains the preemption of the establishment or enforcement of any common law duty that would impose a labeling requirement inconsistent with those established by FIFRA, 7 U.S.C. §§ 136-136y, or the EPA in its regulations, 40 C.F.R. § 156.10. If to avoid breaching a state duty a pesticide producer is required to revise its pesticide labeling, then the duty, common law or otherwise, is preempted by § 136v(b). Yet if the state imposes a duty to improve a product or to maintain a label in accordance with the federal standards, no conflict exists and FIFRA does not preempt.

Because the district court appears to have taken a broader view of FIFRA's preemptive effect, we vacate the judgment and remand for individual reconsideration of the state law claims in accordance with this opinion.

VACATED AND REMANDED

Supreme Court, U.S.
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NO. 90-1837

IN THE

Supreme Court of the United States

OCTOBER TERM 1991

TO BE REPRINTED

MINAS H. PAPAS, et al.,

Petitioners,

vs.

ZOECON CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

While Zoecon's Brief in Opposition attempts to dispute certain facts of this case[1], what is of far greater significance is its complete failure to dispute any of the legal issues presented by this appeal. Rather, Zeocon acknowledges that there is a direct split in the circuits and wide diversity of opinion in the lower and state courts, on the issue

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[1]Where pertinent, Petitioners will address certain incorrect factual assertions set forth in Zoecon's Brief in Opposition, as well as identify matters asserted by Zoecon in its Counter-Statement of the case which are wholly outside the record of this case and are therefore improper for consideration by this Court.

of whether the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. §136, *et. seq.* ("FIFRA") preempts state common law based failure to warn claims. Zoecon also concedes that the question of FIFRA's preemptive effect is an important federal question, and acknowledges that the court of appeals decision in this case failed to address the presumption against federal preemption.

Because the legal issues presented by this case are so well-crystalized and ripe for decision, this Court should grant certiorari in order to resolve the conflict and answer the important questions of federal law presented. Alternatively, as Petitioners have suggested, the Court should hold the instant petition in abeyance pending resolution of *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), 893 F.2d 541 (3rd Cir. 1990), *cert. granted,* 111 S.Ct. 386 (1991).

ARGUMENT

A. ZEOCON CONCEDES THAT THERE IS A DIRECT SPLIT IN THE CIRCUITS ON THE ISSUES PRESENTED BY THIS CASE.

Zoecon's first argument in opposition to certiorari is its illogical and unjustified assertion that this Court should not resolve the clear split of authority between the District of Columbia Court of Appeals and the Eleventh Circuit Court of Appeals on the very question presented by this litigation. Although Zoecon acknowledges that there is a direct conflict between the circuits, which have had occasion to decide the question, and that there is a tremendous split of authority in the lower and state courts (*see,* Brief In Opposition at p. 13), it nevertheless contends that certiorari should not be granted because there is not, in Zoecon's view, a sufficient number of court of appeals decisions on the subject. This argument completely ignores the fact that there is no consistency whatsoever in the federal law regarding the

question of FIFRA preemption, as the ruling and opinion in *Papas v. Upjohn Co.* 926 F.2d 1019 (11th Cir. 1991), *petition for cert. filed,* 59 U.S.L.W. 3825 (U.S. Apr. 29, 1991) (No. 90-1837), is diametrically opposed to the ruling and opinion in *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir. 1984) *cert. denied,* 469 U.S. 1062 (1984). Despite its full recognition of this irreconcilable conflict, Zoecon would nevertheless have this Court overlook it, suggesting that somehow the authority is lopsided in favor of preemption, even though Zoecon acknowledges the vast split of authority on the question in the lower courts. Contrary to Zoecon's contention, lower court cases are not coming down clearly in favor of one rationale over the other, and the conflict only becomes more irreconcilable.[2]

Realizing the futility of these contentions, Zoecon then attempts to argue that other Supreme Court opinions have reduced *Ferebee's* credibility, citing *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987) and *Ingersoll Rand Co. v. McLendon,* 111 S.Ct. 478 (1990), for this erroneous proposition. Zoecon's reliance on these cases is misplaced, as it fails to recognize the significant distinctions between the matters considered in *International Paper Co.,* and *Ingersoll Rand,* and the questions presented by the instant case. *International Paper Co.,* concerned the Clean Water Act, 15 U.S.C. §1251 *et seq.,* which has a regulatory scheme wholly distinguishable from that established in FIFRA. The preemption ruling in *International Paper, Co.,* unlike the court of appeals' decision in the case at bar, did not leave the aggrieved party without any remedy whatsoever for the alleged wrong, as the Court noted:

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[2]Yet another district court has recently ruled that FIFRA does not preempt state law based claims of failure to warn. *See, Riden v. ICI Americas, Inc.,* No. 89-0903-CV-W-1 (W.D. Mo. May 14, 1991).

> Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondent without a remedy. The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The savings clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state. *Id.* at 497

Ingersoll Rand, concerned the Employment Retirement Income Security Act's, 29 U.S.C. §301 *et seq.* ("ERISA"), express preemption of a state law based claim, and in so doing recognized that the plaintiff in that case had an appropriate remedy under ERISA with respect to his pension benefits, the very subject of the act. Neither of the cases cited involved regulatory schemes like FIFRA, where the relevant federal agency regulates products and their warning labels, based upon information submitted by their manufacturers who seek approval. Further, the result in those cases was not that an injured party would be left with no remedy for the wrong perpetrated.

Again acknowledging the vast split in authority on the question presented, Zoecon then suggests that this Court should not grant certiorari because, in Zoecon's opinion, other courts of appeals considering the question of FIFRA preemption will undoubtedly adopt the rationale of *Papas, supra.* This "wait and see" position advocated by Zoecon simply invites greater inconsistency and manifest injustice throughout the federal and state court systems. *See, Beaulieu v. United States,* 893 F.2d 1177 (10th Cir. 1989), *cert. denied,* 110 S.Ct. 3302 (1990), White, J. *dissenting.* The conflict in rulings regarding FIFRA preemption will continue to exist, and will not simply evaporate into thin air as Zoecon would have the court believe.

Moreover, Zoecon's one-sided view completely ignores that

courts throughout the nation are not being persuaded that the *Papas* rationale for finding FIFRA preemption is legally correct. For example, the Supreme Court of New Jersey in *Feldman v. Lederele Laboratories*, No. A-93, (N.J. July 24, 1991), has questioned the Eleventh Circuit's decision in *Papas, supra*. In conducting an implied preemption analysis in an FDA product case, the New Jersey Supreme Court stated:

> The split among courts addressing the issue suggests that there is not a "clear and manifest" expression of congressional intent and calls into question the reasoning and authority of *Papas*. *Id.* at 32.

Similarly, Zoecon's argument escapes notice that this Court's opinion in *Wisconsin Public Intervenor v. Mortier*, 115 L.Ed.2d 532 (1991) recognized that FIFRA was not so comprehensive a regulatory scheme that Congress had totally occupied the field of pesticide regulation so as to completely preclude any augmentation or supplement to the subject. *Id.* at 539. It is clear that the issues presented by this case are ripe for determination by this Court and Zoecon's suggestion to deny certiorari would only fuel the fires of the FIFRA preemption controversy raging throughout the lower courts.

B. ZOECON DOES NOT DISPUTE THAT THE COURT OF APPEALS DECISION IGNORES THE PRESUMPTION AGAINST PREEMPTION.

Zoecon does not truly take exception with the Petitioners' observation that the Eleventh Circuit in the case at bar ignored the presumption against preemption, (*see*, Brief In Opposition at p. 19), as in that court's view the presumption simply does not apply. It nevertheless asserts that the Eleventh Circuit's ignoring the presumption is of no matter, because that court made findings sufficient to overcome the presumption. Zoecon's argument simply glosses over this fallacy

in the Eleventh Circuit's reasoning. As a matter of federal law and this Court's precedents, the presumption against preemption is significant and must always apply. *Maryland v. Louisiana*, 451 U.S. 725 (1981). Improperly ignoring the mandatory presumption against preemption made the Eleventh Circuit's decision finding implied preemption far easier than had it applied the correct presumption. Likewise, Zoecon's contention that the Petitioner's state law tort claims do not involve indirect or incidental regulatory pressure as opposed to direct pressure, is completely at odds with the established law that the presumption against preemption is even greater where state common law claims at issue do not give rise to direct interference with federal regulations, as is created by direct contradicting state regulations. *See, English v. General Electric Co.*, 110 S.Ct. 2270 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

The court of appeals in the instant case completely ignored the presumption against preemption, in keeping with its pronounced view that the presumption does not apply to implied preemption analysis. Because that view is directly contrary to this Court's and other circuit court's decisions on a critically important point of federal law, certiorari should be granted for this reason alone.

C. ZOECON DOES NOT DISPUTE THAT WHETHER CONGRESS INTENDED FIFRA TO PREEMPT PLAINTIFFS' STATE COMMON LAW WARNING CLAIMS IS AN IMPORTANT FEDERAL QUESTION.

Zoecon's Brief in Opposition does not take issue with our contention that the issues presented by this case are significant questions of federal law with far reaching impact. Instead, Zoecon merely asserts that the court of appeals correctly decided these controversial

questions. The decision in *Ferebee, supra,* however, demonstrates otherwise. Moreover, the arguments advancing Zoecon's brief only make it plain that this court's review is necessary. The critically important federal question presented by this case - whether Congress intended FIFRA to preempt common law claims - will not go away. The question should be decided by this court in this case.

Apparently driven by concerns about the extraordinary facts of this case; i.e.: the EPA and FDA approving Paramite's label without knowing that Paramite contains benzene, and the Eleventh Circuit then holding that the EPA's approval of the label preempts Plaintiffs' claims, when the Fifth Circuit had already held in similar circumstances that FDA approval does not, Zoecon takes extraordinary steps in regards to the facts. First it makes several inaccurate factual representations in its Counter-Statement of the Case[3]. It also blatantly presents facts

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[3]For example, Zoecon in its brief at page 8, for the first time in the case, asserts that Petitioners incorrectly represent that Paramite was approved by both EPA and the Food and Drug Administration ("FDA") pursuant to the Federal Drug and Cosmetic Act, 21 U.S.C. §301 et. seq. ("FDCA"), as a new animal drug. The record below includes the following deposition testimony of Sally A. Jaksa, Zoecon's Manager of Regulatory Affairs:

Q: Ok. Are you familiar with when the Paramite product was approved by any governmental agency?

A: Generally, yes.

Q: Ok, could you tell me about when that was.

A: When? Late seventies. I think.

Q: Ok. And do you know which governmental agencies approved the Paramite formula product?

A: Well, initially it was FDA and then EPA and I don't know which was first.

Q: Initially FDA?

A: Uh-huh.

Q: Do you know why this product would be looked at by both FDA and EPA?

A: It is an FDA product because it controls an internal parasite, grubs.

Q: Was a new - new drug application filed with the FDA?

A: Yes.

Transcript of oral deposition of Sally A. Jaksa taken February 3, 1989 at p. 18.

wholly outside the record[4]. Both of these steps are taken to bolster Zoecon's weak argument.

That is why this Court need decide whether a manufacturer who submits inaccurate or incomplete information to the EPA is immune from suits for injuries caused by the resultant inadequate warnings, even if FIFRA ordinarily preempts warning claims.

Zoecon essentially concedes that the holding in *Hurley v. Lederele Laboratories*, 863 F.2d 1173 (5th Cir. 1988), also conflicts with the court of appeals decision in *Papas, supra*. In *Hurley*, the Fifth Circuit, considering the preemptive effect of the FDCA, reasoned that preemption could occur only where the FDA had processed all of the

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Similarly, Zoecon claims that benzene is an impurity in Paramite's inert ingredient, as opposed to the inert itself, and that somehow this is of significance. In fact however, the significant point is that harmful benzene is always present in Sure Sol 190, (the inert ingredient comprising 75% of Paramite) in toxicologically significant amounts, approximately 1/10 of 1% benzene by weight according to Sure Sol 190's manufacturer. However the benzene is classified is of no matter and is simply an argument over semantics.

[4]For example, Zoecon's factual assertions at page 10 of its brief that, as a result of the Petitioners' allegations, Zoecon determined Paramite's benzene content and informed EPA, which determined an additional warning was not required, is completely outside the record in this case. It is also at odds with Zoecon's position in this litigation, that Paramite and its inert Sure Sol 190 do not contain benzene to Zoecon's knowledge. Moreover, even if Zoecon's assertions were true, they would only lend credence to the Petitioners' claims that EPA's regulation of pesticides is woefully deficient.

Likewise, Zoecon's argument concerning the Petitioners' filing a separate suit against Sure Sol 190's manufacturer is misleading, particularly with regards to the availability of an alternative remedy. Petitioners attempted to add the manufacturer to the litigation, but the district court did not permit the joinder, because in its view the claims against the manufacturer of Sure Sol 190 included failure to warn claims that are likely preempted (*see* Pet. App. p. 25). The separate suit was filed to avoid the arguable running of the statute of limitations and the suit has also been stayed by the same district judge presiding over this case, pending the instant appellate proceedings' resolution.

relevant and available information on which to base the warning in question. *Id.* at 1179.

Zoecon's argument that the holding in *Hurley*, should not affect the outcome of this case is premised on two flawed contentions. First, Zoecon contends that the Petitioners' analogy between the FDCA and FIFRA is in error because whereas the FDA is a "partially passive agency," the EPA's role under FIFRA, according to Zoecon, is different. This assertion is completely incorrect. Under the statutory scheme of FIFRA, the EPA, like the FDA under the FDCA, specifies what data must be submitted, reviews the data submitted by manufacturers, and then approves or disapproves the warning label submitted. By statute and/or the applicable regulations, the EPA is no more active an agency than the FDA in this regard. The role EPA plays under FIFRA is certainly no greater than the role the FDA plays in considering products for approval and their warnings under the FDCA.

Petitioners pointed out to the court of appeals that it makes no sense that Zoecon would be insulated from liability for inadequate warnings associated with the Paramite product when that product was approved both by the FDA and the EPA, especially when Upjohn's similar FDA product would not enjoy such an immunity.

Petitioners also pointed out that, even if FIFRA ordinarily preempts failure to warn claims, because Zoecon submitted inadequate or inaccurate data concerning Paramite to EPA, that under the *Hurley, supra*, rationale, there should be no preemption.

Zoecon, by incorrectly asserting that Paramite was never approved by FDA, attempts to somehow distinguish the situation in *Hurley* (an FDA case) from the instant case, without any basis for such a distinction. The record in the case indicates the Paramite product was approved by both agencies, and also clearly establishes that Zoecon never informed EPA of Paramite's benzene content. In fact, Zoecon had

insisted throughout this litigation, until it filed its Brief In Opposition, that Paramite contained no benzene whatsoever (*see*, note 4, *infra*). Accordingly, the extant facts in this case are ideal for this Court to decide whether or not the *Hurley, supra,* "exception" to preemption is applicable law.

The *Hurley* rationale certainly makes sense. Before a warning label approved by a federal agency can properly be the basis of preemption, it is imperative that the agency (unlike in this case) receive accurate and complete data necessary for making such a decision. Because manufacturers are solely responsible for providing the information to the agency, if incomplete or inaccurate data results in a deficient warning, there should be no immunity from state law claims because, as in this case, the injury would largely be the fault of the manufacturer. Absent the *Hurley* "exception", manufacturers whose products injure consumers would never be required to answer for such injuries.

This case presents the factual scenario whereby the relevant agency was not provided with accurate or adequate information when it registered the product and approved its warning labels. This Court should also grant certiorari in order to determine whether state common law based tort claims are preempted by FIFRA under such conditions.

D. ZOECON'S ARGUMENT THAT THE DECISION IN *CIPOLLONE V. LIGGETT GROUP, INC.* WILL NECESSARILY HAVE NO IMPACT ON THIS CASE IS ERRONEOUS.

As pointed out in the Petition, because this Court has granted certiorari in *Cipollone v. Liggett Group, Inc., supra,* and in that

Cipollone involves similar issues relative to a preemption analysis, should this Court not grant certiorari outright in this case, it should nevertheless hold the instant Petition in abeyance pending resolution of *Cipollone*. It is hypocritical for Zoecon to suggest that the distinctions between FIFRA and the Federal Cigarette Labeling and Advertising Act 15 U.S.C. §1331 *et. seq.* (the "Cigarette Act"), at issue in *Cipollone*, mitigate against holding the instant Petition in abeyance. As Petitioners have pointed out, pesticide manufacturers, including Zoecon in this very case, began to raise the preemption defense after *Ferebee, supra*, had seemingly resolved the issue, when the defense found favor in certain cases involving the Cigarette Act. In fact, decisions in Cigarette Act cases served as the preeminent and often only judicial authority cited by courts to support a finding of FIFRA preemption. *See, e.g. Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D.Mich. 1987).

Because it is clear that the argument supporting FIFRA preemption of pesticide warning claims is far less compelling than the argument for express preemption asserted in Cigarette Act cases, it is certainly logical that, at a minimum, the instant Petition should be held in abeyance. Undoubtedly, this Court will also address in detail the presumption against preemption in resolving *Cipollone*, which will significantly impact any decision in the case at bar. The fact that Zoecon has opposed certiorari as well as abeyance pending the outcome of *Cipollone*, despite the unquestionable split of authority existing in the courts on the issue of FIFRA preemption, is indicative that Zoecon genuinely fears that if this Court reviews this case, it will appropriately rule that FIFRA does not preempt common law warning claims, such as those brought by the Petitioners.

CONCLUSION

For the foregoing reasons, the Petition For A Writ of Certiorari should be granted. In the alternative, this Court should hold the instant Petition in abeyance, pending the resolution of *Cipollone v. Ligget Group, Inc.*

Respectfully submitted,

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